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89-5503

NO.

IN THE SUPREME COURT OF THE UNITED STATES
August Term, 1989

FREDERICK LYNN,

Petitioner,

V.

STATE OF ALABAMA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE ALABAMA SUPREME COURT

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August 31, 1989

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QUESTIONS PRESENTED

Whether the prosecutor's use of his peremptory challenges to remove all eleven black persons from the petit jury with no adequate race-neutral explanation deprived the Petitioner of his Sixth Amendment United States Constitutional right to trial by an impartial jury representative of a fair cross-section of the community and his Fourteenth Amendment United States Constitutional right to equal protection of the laws.

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OPINIONS BELOW

The Court of Criminal Appeals of Alabama affirmed the Petitioner's conviction, on return to remand, on June 9, 1987, and is reproduced at App. 1 (pages of the Appendix to this Petition). A Petition for Rehearing was denied by the Court of Criminal Appeals of Alabama on July 29, 1987, and is reproduced at App. 2. A Petition for a Writ of Certiorari was denied by the Alabama Supreme Court on December 30, 1988, and is reproduced at App. 3. An Application for Rehearing was overruled, without opinion, on July 14, 1989, and is reproduced at App. 4.

JURISDICTION

The judgment of the Alabama Supreme Court was entered on December 30, 1988. The Petitioner's Application for Rehearing was overruled by the Alabama Supreme Court on July 14, 1989. This Honorable Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. United States Constitution, Amendment VI

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

2. United States Constitution, Amendment XIV, Section 1

> "No state shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

3. The statute under which the Petitioner was convicted by a jury, Ala.Code §13A-5-31(a)(4) (1975), provides:

> Aggravated offenses for which death penalty to be imposed; felony-murder doctrine not to be used to supply intent; discharge of defendant upon finding of not guilty; mistrials; reindictment after mistrial
>
> (a) If the jury finds the defendant guilty, it shall fix the punishment at death when the defendant is charged by indictment with any of the following offenses and with aggrevation, which must be averred in the indictment, and which offenses so charged with said aggravation shall not include any lesser offenses.
>
> (4) Nighttime burglary of an occupied dwelling when any of the occupants is intentionally killed by the defendant.

4. Ala.Code §12-16-55 (1975), provides:

> It is the policy of this state that all persons selected for jury service be selected at random from a fair cross section of the population of the area served by the Court, and that all qualified citizens have the opportunity, in accordance with this article, to be considered for jury service in this state and an obligation to serve as jurors when summoned for that purpose. (Acts 1978, No. 594, p. 712 §1).

5. Ala.Code §12-16-56 (1975), provides:

> A citizen shall not be excluded from jury service in this state on account of race, color, religion, sex, national origin or economic status. (Acts 1978, No. 594, p. 712, §2).

STATEMENT OF THE CASE

On April 25, 1983, the Barbour County, Alabama, Grand Jury returned the following capital indictment charging the Petitioner with violating §13A-5-31(a)(4) (murder during a burglary), Ala.Code, 1975.

The Grand Jury of said County charged that:

> . . . Frederick Lynn, whose name is to the Grand Jury otherwise unknown, did, in the nighttime, with intent to commit a felony, to-wit: Burglary, First Degree, knowingly and unlawfully, break into and enter an inhabited dwelling, to-wit: That certain house located at 593 South Randolph Street, Eufaula, Alabama, which was occupied by Marie Driggers Smith, a person lodged therein and while effecting entry or while in the inhabited dwelling or in immediate flight therefrom, said Frederick Lynn was armed with a deadly weapon, to-wit: a shotgun, and during the course of said nighttime burglary Frederick Lynn did intentionally cause the death of another person, to-wit: Marie Driggers Smith, by shooting her with a shotgun, in violation of Section 13A-5-31(a)(4) of the 1975 Code of Alabama, as amended.

On May 2, 1983, the Petitioner, Frederick Lynn, was arraigned. At arraignment, the Petitioner, who was sixteen years of age at the time of the occurrence of the murder, filed an application to be tried as a youthful offender. (7C-8C in record in 4 Div. 183). The application was denied. (8C in record in 4 Div. 183). At arraignment, Frederick Lynn pled "not guilty". On May 26, 1983, the Defendant was found guilty of the capital offense. (R. 369). After further proceedings, the jury recommended a death sentence. (R. 404). On May 31, 1983, the Judge fixed the Petitioner's punishment as death by electrocution. (R. 423). On October 23, 1984, the Alabama Court of Criminal Appeals affirmed the Petitioner's conviction; however, the Alabama Supreme Court granted certiorari and on July 3, 1985, the Alabama Supreme Court reversed the conviction and remanded the case for a new trial. Ex parte Lynn, 477 So.2d 1385 (Ala. 1985).

The Petitioner was retried on March 31 through April 4, 1986. On April 4, 1986, the jury returned a verdict of "guilty". (R. 388). After further proceedings, the jury recommended a sentence of death by electrocution in the electric chair. (R. 432). On April 9, 1986, the trial Judge held a sentencing hearing at

which time he fixed the sentence as death by electrocution. (R. 443).

On March 10, 1987, the Alabama Court of Criminal Appeals remanded the case to the Circuit Court of Barbour County for that Court to make a determination as to whether the prosecutor's striking of all eleven blacks from the jury venire was racially motivated. On May 13, 1987, the Circuit Court held a hearing to determine whether the prosecution's strikes were racially motivated and ruled that, although a prima facie case of purposeful discrimination existed, the prosecution had rebutted the presumption of purposeful discrimination through adequate race-neutral explanation of its peremptory challenges. On June 9, 1987, on return to remand, the Court of Criminal Appeals affirmed Lynn's conviction. On July 28, 1987, Lynn's Application for Rehearing was overruled by the Alabama Court of Criminal Appeals. Pursuant to the Code of Alabama §13A-5-55, the Alabama Supreme Court granted certiorari on November 25, 1987. The Alabama Supreme Court affirmed the judgment of the Court of Criminal Appeals on December 30, 1988. [Ex parte Lynn, 543 So.2d 709 (Ala. 1988)]. A Motion for Reconsideration was denied on July 14, 1989.

REASONS FOR GRANTING THE WRIT

THIS HONORABLE COURT SHOULD GRANT CERTIORARI TO CONSIDER THE CONSTITUTIONAL DEPRIVATION INCIDENT TO A PROSECUTOR'S USE OF HIS PEREMPTORY CHALLENGES TO REMOVE ALL ELEVEN BLACK PERSONS FROM THE PETIT JURY WITH NO ADEQUATE RACE-NEUTRAL EXPLANATION, THEREBY DEPRIVING THE PETITIONER OF HIS SIXTH AMENDMENT RIGHT TO A TRIAL BY AN IMPARTIAL JURY REPRESENTATIVE OF A FAIR CROSS-SECTION OF THE COMMUNITY AND HIS FOURTEENTH AMENDMENT UNITED STATES CONSTITUTIONAL RIGHT TO EQUAL PROTECTION OF THE LAWS.

A review on Writ of Certiorari is a matter of judicial discretion, and will be granted only for special and important reasons. The Alabama Supreme Court has decided an important question of federal constitutional law in a manner which conflicts with applicable decisions of this Honorable Court. This is a capital murder case for which the Petitioner was sentenced to death by electrocution, in which the Alabama Supreme Court denied the Petitioner's Writ of Certiorari in the face of evidence which clearly indicated that the government prosecutor was racially biased in his striking of all eleven black persons from the petit jury for which there was no adequate race-neutral explanation given.

The Petitioner, Frederick Lynn, asserts that the government prosecutor purposely excluded all blacks from his jury solely on the basis of race, in direct contravention of this Honorable Court's decision in Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), and violated the guidelines for the determination of whether the prosecutor provided adequate race-neutral explanations for the striking of blacks from the jury venire as provided by the Alabama Supreme Court in Ex parte Jackson, 516 So.2d 768 (Ala. 1986) and Ex parte Branch, 526 So.2d 609 (Ala. 1987). In the instant case, during the voir dire proceedings, the government prosecutor exercised eleven of his fourteen peremptory strikes to remove all eleven blacks from the Petitioner's jury. It should also be noted that the Petitioner is a black male and the victim was a white female.

This Honorable Court in Batson v. Kentucky, supra, addressed an equal protection challenge to the prosecutor's exclusion of blacks from the petit jury through the use of his

peremptory challenges. This Court acknowledged the State's privilege to strike individual jurors through peremptory challenges. However, this Court noted that these peremptory challenges are subject to the equal protection clause, stating that:

> Although a prosecutor ordinarily is entitled to exercise permitted peremptory challenges for any reason at all, as long as that reason is related to his view concerning the outcome of the case to be tried, the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group, will be unable impartially to consider the state's case against a black defendant. (Emphasis added). Batson, 106 S.Ct. at 1719.

This Court reiterated that purposeful racial discrimination in selection of the venire violates a Defendant's rights to equal protection because it denies him the protection that a trial jury is intended to secure.

> The very idea of a jury is a body . . . composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds . . . Those on the venire must be "indifferently chosen" to secure the Defendant's right under the Fourteenth Amendment to "protection of life and liberty against race or color prejudice." Batson, 106 S.Ct. at 1717, quoting Strauder v. West Virginia, 100 U.S. 303 (1880).

A systematic plan for purposely excluding all or most black veniremen from the petit jury is not a prerequisite for a constitutional violation under the Batson decision. The prosecutor's challenge of a single black on racial grounds will deprive the Defendant of his rights under both the Sixth and Fourteenth Amendments since "a State's purposeful or deliberate denial of Negros on account of race of participation as jurors in the administration of justice violates the Equal Protection Clause." Ex Parte Jackson, S.Ct., Alabama No. 84-1112 (December 1986), citing Swain v. Alabama, 380 U.S. 202, 203-04 (1965). This Court reasoned that:

> . . . "a consistent pattern of official racial discrimination" is not "a necessary predicate to a violation of the Equal Protection Clause." A single invidiously discriminatory governmental act" is not immunized by the absence of

> such discrimination in the making of other comparable decisions." Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977). (Emphasis added).

This Honorable Court appeared to affirm this fact in the case of Alonzo Houston v. Alabama, Ala. S.Ct. No. 86-616 (1987), cert. granted, United States S.Ct. No. 86-7126 (May 1988), in which this Court granted the Petitioner's petition for writ of certiorari and remanded the judgment on the grounds that the removal of a single black from the petit jury by the government prosecutor without adequate race-neutral explanation denies the criminal defendant his Sixth Amendment United States Constitutional right to a trial by an impartial jury representative of a fair cross-section of the community and his Fourteenth Amendment United States Constitutional right to equal protection of the laws.

This Court in Batson, supra, articulated the following three-prong test that the Defendant must meet to establish a prima facie case of purposeful racial discrimination based upon the prosecutor's exercise of his peremptory challenges during the voir dire proceedings: Batson, 106 S.Ct. at 1723. (1) The Defendant must show that he is a member of a cognizable racial group and that the prosecutor has exercised peremptory challenges to remove from the venire members of the Defendant's race, (2) The Defendant is entitled to rely on the fact, as to which there can be no dispute that peremptory challenges constitutute a jury selection practice "those to discriminate who are of a mind to discriminate", (3) The Defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race. The Petitioner, a black man, is a member of an identifiable racial group. Furthermore, since the government struck all black jurors from the petit jury with the use of its peremptory challenges, a prima facie case under Batson, supra, has been established, with a presumption that the peremptory challenges were used to discriminate against

black jurors. Lynn v. State, 543 So.2d 704, 708 (Ala. Cr. App. 1987).

After a prima facie case of discrimination has been established by the Defendant, the State then has the burden of articulating a clear, specific, and legitimate reason for the challenge which relates to the particular case to be tried, and which is nondiscriminatory. Batson, 476 U.S. at 97, 106 S.Ct. at 1723. However, this showing need not rise to the level of a challenge for cause. Jackson, supra; People v. Wheeler, 22 Cal.3d 258, 583 P.2d 748, 764, 148 Cal. Rptr. 890 (1978). In the case of Ex parte Branch, 526 So.2d 609 (Ala. 1987), the Alabama Supreme Court has established certain guidelines whereby the Court may be guided in assessing the "neutrality" of the prosecution's use of his peremptory strikes. Ex parte Branch, at 623, provides:

> In addition to a clear, specific and plausible nondiscriminatory explanation of a specific characteristic that affected the decision to challenge, the following are illustrative of the types of evidence that can be used to overcome the presumption of discrimination and show neutrality:
>
> 1. The state challenged non-black jurors with the same or similar characteristics as the black jurors who were struck.
>
> 2. There is no evidence of a pattern of strikes used to challenge black jurors; e.g., having a total of 6 peremptory challenges, the state used 2 to strike black jurors and 4 to strike white jurors, and there were blacks remaining on the venire.
>
> [5] Batson makes it clear, however, that 'the State cannot meet this burden on mere general assertions that its officials did not discriminate or that they properly performed their official duties. Rather, the State must demonstrate that permissible racially neutral selection criteria and procedures have produced the monochromatic result.' Batson, 476 U.S. at 94, 106 S.Ct. at 1721, citing Alexander v. Louisiana, 405 U.S. 625, 632, 92 S.Ct. 1221, 1226, 31 L.Ed.2d 536 (1972). Furthermore, intuitive judgment or suspicion by the prosecutor is insufficient to rebut the presumption of discrimination. Batson, 476 U.S. at 97, 106 S.Ct. at 1723. Finally, a prosecutor cannot overcome the presumption 'merely by denying any discriminatory motive or affirming his good faith in individual selections.' Batson, 476 U.S. at 98, 106 S.Ct. at 1723, citing Alexander, 405 U.S. at 632, 92 S.Ct. at 1226.

> Once the prosecutor has articulated a nondiscriminatory reason for challenging the black jurors, the other side can offer evidence showing that the reasons or explanations are merely a sham or pretext. Wheeler, 22 Cal.2d at 282, 583 P.2d at 763-64, 148 Cal. Rptr. at 906. Other than reasons that are obviously contrived, the following are illustrative of the types of evidence that can be used to show sham or pretext:
>
> 1. The reasons given are not related to the facts of the case.
>
> 2. There was a lack of questioning to the challenged juror, or a lack of meaningful questions.
>
> 3. Disparate treatment - persons with the same or similar characteristics as the challenged juror were not struck. Slappy, 503 So.2d at 354; Wheeler, 22 Cal.3d at 282, 583 P.2d at 760, 148 Cal. Rptr. at 906.
>
> 4. Disparate examination of members of the venire; e.g., a question designed to provoke a certain response that is likely to disqualify the juror was asked to black jurors, but not to white jurors. Slappy, 503 So.2d at 355.
>
> 5. The prosecutor, having 6 peremptory challenged, used 2 to remove the only 2 blacks remaining on the venire. Slappy, 503 So.2d at 354; People v. Turner, 42 Cal.3d 711, 715, 726 P.2d 102, 103, 230 Cal. Rptr. 656, 657 (1986).
>
> 6. 'An explanation based on a group bias where the group trait is not shown to apply to the challenged juror specifically.' Slappy, 503 So.2d at 355. For instance, an assumption that teachers as a class are too liberal, without any specific questions having been directed to the panel or the individual juror showing the potentially liberal nature of the challenged juror.
>
> [6, 7]. The trial court, in exercising the duties imposed upon it, must give effect to the state policy expressed in Sections 1, 6, and 22 of the Alabama Constitution and Code 1975, §12-16-55 and §12-16-56. Furthermore, the trial judge must make a sincere and reasonable effort to evaluate the evidence and explanations based on the circumstances as he knows them, his knowledge of trial techniques, and his observation of the manner in which the prosecutor examined the venire and the challenged jurors. People v. Hall, 35 Cal.3d 161, 672 P.2d 854, 858, 197 Cal. Rptr. 71 (1983); see also Wheeler, 22 Cal.3d at 281, 583 P.2d at 764, 148 Cal. Rptr. at 906.
>
> In evaluating the evidence and explanations presented, the trial judge must determine whether the explanations are sufficient to overcome the presumption of bias. Furthermore, the trial judge must be careful not to confuse a specific reason given by the state's attorney for his challenge, with a 'specific bias' of the juror, which may justify the peremptory challenge:

> 'The latter, a permissible basis for exclusion of a prospective juror, was defined in Wheeler as a bias relating to the particular case on trial or the parties or witnesses thereto. Wheeler, 22 Cal.2d at 276, 148 Cal. Rptr. at 903, 583 P.2d at 760.' Slappy, 503 So.2d at 354.
>
> The trial judge cannot merely accept the specific reasons given by the prosecutor at face value, see Hall, 35 Cal.3d at 168, 672 P.2d at 858-59, 197 Cal. Rptr. at 75; Slappy, 503 So.2d at 356; the judge must consider whether the racially neutral explanations are contrived to avoid admitting acts of group discrimination. See Slappy, supra. This evaluation by the trial judge is necessary because it is possible that an attorney, although not intentionally discriminating, may try to find reasons other than race to challenge a black juror, when race may be his primary factor in deciding to strike the juror. Finally, if the trial judge determines that there was discriminatory use of peremptory challenges, an appropriate remedy may be to dismiss that jury pool and start over with a new pool. Jackson, supra, citing State v. Neil, 457 So.2d 481, 487, (Fla. 1984). This remedy is not exclusive, however.

Ex parte Branch, 526 So.2d 609.

The Petitioner asserts that the instant case violates the mandates against purposeful racial discrimination in the striking of black veniremen that this Honorable Court set forth in Batson, supra, as well as the guidelines articulated by the Alabama Supreme Court in Branch, supra. In Lynn, there was virtually no questioning of black venire persons, or at best, only desultory voir dire directed towards blacks by the government prosecutor. On March 10, 1987, the Alabama Court of Criminal Appeals remanded the case to the Circuit Court of Barbour County to make a determination as to whether the prosecutor's striking of all blacks from the jury venire was racially motivated. On May 13, 1987, the Circuit Court held a Batson hearing in order to make this determination. (R. 3). The Circuit Court specifically found that a prima facie case of purposeful discrimination existed in the Lynn case. (R. 4). However, the Circuit Court failed to find that the government prosecutor's strikes were racially motivated, and refused to grant the Petitioner's motion for a new trial. (R. 33). The Petitioner now asserts that the trial judge's ruling was clearly erroneous in that the prosecutor's explanations were not adequate race-neutral explanations as

mandated by Batson, supra, and Branch, supra. While the Petitioner again reiterates the fact that a prima facie case of purposeful racial discrimination was established under Batson, supra, and Branch, supra, in that all eleven black veniremen were struck by the government prosecutor, the Petitioner specifically challenges the prosecutor's explantions for striking the following black veniremen from the petit jury:

(1) Government Strike #3, Juror #11 - Larry B. Farmer: A black male, twenty-five (25) years of age at the time of the trial. The government prosecutor gave as his reasons for striking this black man that Mr. Farmer was "reputed to be connected with drugs", that his father had a felony record and had been convicted of a drug-related offense, and that Mr. Farmer lived in the same area of the county as did the lead defense counsel, Mr. McKinnon, and that Mr. Farmer "might" know the counsel for the defense. Finally, the government prosecutor stated that he was young and felt that the juror would not be favorable to the death penalty. (R. 6; 7).

The Petitioner asserts that these reasons given by the government prosecutor are vague, superficial and fail to meet the test for race-neutral reasons to exercise a challenge. The record reflects that the prosecutor failed to engage the juror in even desultory voir dire. Furthermore, the prosecution failed to strike juror number two, a white male, who at the time of trial was only twenty-two (22) years of age, as well as juror number twenty-eight, a white male, who at the time of trial was only twenty-eight (28) years of age. These facts substantiate the Petitioner's assertions that the prosecutor's reason given concerning Mr. Farmer's age were not race-neutral, and evidences the disparate treatment of blacks rendered by the prosecutor in the jury selection.

In regard to the explanation given by the prosecutor that Mr. Farmer "might" know the lead defense attorney, if the prosecutor had been concerned about a possible relationship, he could have asked the juror about any friendship. However, again, the prosecutor

failed to engage the juror in even desultory voir dire, in direct contravention of Batson, supra, and the guidelines enunciated in Branch, supra.

(2) Government Strike #4, Juror #38 - Robert J. Thornton:

Mr. Thornton was a fifty-nine (59) year old black male at the time of trial. The government prosecutor stated that he struck Mr. Thornton from the jury venire because the juror lived in an area where the defendant was living at the time of the crime and where the defendant's grandmother and aunt resided. (R. 7). The prosecutor stated that " . . . he felt that friendship would possibly be there that would bias him, and for that reason we struck him." (Emphasis added) (R. 7).

The Petitioner avers that these reasons given by the government prosecutor for striking this black juror do not meet the stringent standards under Batson, supra, and Branch, supra. The record reflects that the prosecutor failed to direct even one question to Mr. Thornton concerning his "possible friendship" or relationship. If the government prosecutor had been concerned about a possible bias on the part of Mr. Thornton, he could have asked Mr. Thornton questions about his relationship with the Petitioner or his grandmother and aunt. This the prosecutor failed to do.

Furthermore, the Petitioner asserts that the explanation given by the prosecutor that Mr. Thornton lived in the same area of town as the Defendant and his grandmother and aunt is not a valid race-neutral reason, but is rather an impermissible group bias violating Branch, supra, at 624. This case was tried in Eufaula, Alabama. During the Batson hearing conducted on May 13, 1987, the government prosecutor stated that " . . . this is a very small community with a population of twenty-five thousand (25,000) people [county population] of which over twelve thousand five hundred (12,500) live in the Eufaula area and would have been potential jurors." (R. 8). It is a well-known fact that in small, rural areas of the South, blacks tend to live in the same

neighborhoods and they do so in Eufaula, Alabama. Therefore, following the rationale set forth by the government prosecutor, and upheld by the Alabama Courts, it would be virtually impossible for a black person in rural communities of the South to ever sit on a jury where the criminal defendant was black. In effect, blacks in Eufaula, Alabama, were rendered ineligible for jury duty in the Petitioner's case or any other similar situation because of a group bias having no relationship whatsoever with the facts of the case, in direct contravention of Batson, supra, and Branch, supra.

(3) Government Strike #5, Juror #19 - Jim H. Jackson:

Mr. Jackson was a black male, age thirty-five (35) at the time of the trial. The government prosecutor gave as his explanation for striking Mr. Jackson that he was a co-employee of the father of Gary Marcus Strong, an accomplice and co-defendant and a government witness against the Defendant. Mr. Strong, the accomplice, had a "bad reputation" in the community and had pleaded guilty "to a crime in connection with [the] crime" for which the defendant was being tried. The prosecutor felt that "if" the juror knew Mr. Strong he "might" not not believe his testimony. (R. 8). Additionally, a small community was involved and the juror's name was Jackson. The prosecutor had prosecuted several black people named Jackson during the past eight years, and was concerned that the juror might be related to one of those persons. (R. 8).

The Petitioner asserts that these reasons given by the government prosecutor were not adequate race-neutral explanations. The prosecutor stated that Mr. Jackson "might" have known the accomplice, Gary Marcus Strong, and that he "might" have been related to some people that he had prosecuted named Jackson. However, significantly, the prosecutor acknowledged that the surname "Jackson" was a common name in the community. (R. 9). Furthermore, the record of voir dire proceedings once again reflects the fact that the prosecutor failed to engage the juror in even desultory voir dire - that there was, in fact, a total lack of questioning of Mr. Jackson on part of the prosecution.

If the prosecuter had been concerned about whether Mr. Jackson "might" have known the accomplice, or whether he "might" have been related to some people that he had convicted, he could have asked Mr. Jackson about these possible relationships. Furthermore, since Gary Marcus Strong had already pleaded guilty to a lesser offense involving this crime, as part of a plea bargain agreement with the State of Alabama, white people in the community were just as aware of the bad reputation of Gary Marcus Strong as were the black people of the community. Therefore, the government prosecutor's argument must fail as being a mere sham reason violating the strict standards enunciated in Batson, supra, and Branch, supra.

(4) Government Strike #6, Juror #42 - Rose M. Wright:

At the time of trial, Ms. Wright, a black female, was twenty-eight (28) years of age. The government prosecutor stated as his reasons for striking Ms. Wright that she was young, unemployed, and lived close to a city magistrate who happened to be named Peggy Wright. (R. 10). The prosecutor stated that he was concerned about the fact that the lead defense counsel was also the City Clerk of the City of Eufaula, Alabama, where Ms. Peggy Wright was the City Magistrate and that "he did not know whether Rose M. Wright is related to Ms. Peggy Wright, the City Magistrate. (R. 10).

The Petitioner again asserts that these are vague, superficial explanations which so not meet the rigid requirements of "clear, specific and legitimate" reasons as mandated by this Honorable Court in Batson, supra. Once again, the government attempted to prove a race-neutral explanation by alleging a possibility of bias on the part of a juror who lived in the "same neighborhood" as someone who "might" have been connected with the Defendant. However, once again, the record reflects that the prosecutor failed to ask the juror any questions on voir dire, which is ". . . illustrative of the types of evidence that can be used to show sham or pretext". Branch, supra, at 624. Furthermore, the government prosecutor stated that Ms. Wright's age of twenty-eight (28), made her unattractive as a juror;

however, significantly, the prosecutor failed to strike juror #2, a white male, who at the time of trial was only twenty-two (22) years of age, and juror #28, another white male, who at the time of trial was only twenty-eight (28) years of age, the same age as Ms. Wright, whom the prosecution eliminated. The Alabama Supreme Court stated in Branch, supra, that "Disparate treatment - persons with the same or similar characteristics as the challenged jurors were not struck," is " . . . illustrative of the types of evidence that can be used to show sham or pretext." Branch, supra, at 624. The Petitioner asserts that this fact is further evidence of disparate treatment with which the government prosecutor struck the veniremen from the jury, violating the guidelines for race-neutral explanations specifically articulated in Branch, supra, at 624, for determining the existence of purposeful racial discrimination under Batson, supra.

(5) Government Strike #7, Juror #36 - Rochella Streeter:

At the time of trial, Ms. Streeter, a black female, was thirty-three (33) years old. The government prosecutor stated that the reason he struck Ms. Streeter from the jury was that Ms. Streeter lived "approximately one block away" from the co-defendant, accomplice, Gary Marcus Strong, and that he "felt that anyone that knew [Strong] might doubt what he was telling even though he was under oath." (R. 10). The prosecutor stated that another reason for striking Ms. Streeter was that she lived in "a very high crime district" and might "not be as shocked or opposed to crime because those things just happen in those neighborhoods more than others." (She lived in a predominently black neighborhood). (R. 11). However, again, the government prosecutor failed to direct a single question to Ms. Streeter regarding any of these concerns. The Petitioner avers that Ms. Streeter could very well have had very strong feelings against criminal behavior for the very reason that she does come from an alleged "high crime district." The important fact here is that the government prosecutor failed to inquire about these alleged concerns during voir dire; in fact, the prosecutor failed to ask Ms. Streeter even a single question. The Petitioner asserts that

these are all reasons which do not meet the rigid standards of the specific, ascertainable race-neutral explanations required by Batson, supra, and that these sham reasons were contrived by the government prosecutor to disguise his true motive of purposeful racial discrimination against the black veniremen, thereby denying the Petitioner equal protection of the laws under the Fourteenth Amendment to the United States Constitution. Batson, 106 S.Ct. at 1719.

(6) Government Strike #9, Juror #26 - Helen D. Morris: At the time of the Petitioner's trial, Ms. Morris, a black female, was fifty-two (52) years of age. The government prosecutor stated as his explanation for striking Ms. Morris that:

> She also lives on Gammage Road and was a neighbor to Ms. Rency Lynn who is the Defendant's grandmother and also Alvester Lampley who is the Defendant's aunt, and also was living in close proximity to the Defendant who was living with his grandmother and aunt at the time of the crime. We felt [that] the possibility of knowing these people might affect her fairness, and for that reason we struck her. (Emphasis added). (R. 11).

The Petitioner avers that these aforementioned reasons given by the government prosecutor are not adequate race-neutral explanations. Again, the record reflects that the government prosecutor failed to engage Ms. Morris in even desultory voir dire, by failing to direct one single question to Ms. Morris during the voir dire proceedings.

The Petitioner asserts that the government prosecutor's explanation that Ms. Morris "might" be biased because of the "possibility" of knowing either the Defendant's grandmother or his aunt is unsubstantiated, but is rather an example of an impermissible group bias violating Branch, in that it is "[A]n explanation based on a group bias where the group trait is not shown to apply to the challenged juror specifically." Branch, supra, at 624, quoting Slappy, 503 So.2d at 355. As the prosecutor himself testified under oath, the community where the Petitioner was tried is a "very small community of a population

of twenty-five thousand people of which over twelve thousand five hundred live in the Eufaula area and would have been potential jurors." (R. 8). Therefore, because of the fact that in rural communities of the South, it is very common for blacks to live in the same neighborhoods, it would be virtually impossible for a black person residing in rural communities in the South to ever sit on a jury where the criminal defendant was black, if the rationale enunciated by the government prosecutor, and followed by the Alabama courts, were to be followed by this Honorable Court. The Petitioner asserts that the explanation articulated by the government prosecutor for striking Ms. Morris from the petit jury falls far short of "clear, specific, and legitimate" reasons required for adequate race-neutral explanation. Batson, 476 U.S. at 97, 106 S.Ct. at 1723.

It is apparent that the prosecutor's exercise of his peremptory challenges to rid the jury venire of all eleven blacks, and specifically those challenges concerning jurors 11, 38, 19, 42, 36, and 26, did not meet the strict criteria of "clear, specific and legitimate" reasons as mandated by this Honorable Court in Batson, supra, and also violates the guidelines for adequate race-neutral explanation as set forth by the Alabama Supreme Court in Branch, supra. Furthermore, this case is a proper one for this Honorable Court to grant certiorari and vacate the Petitioner's conviction because of the fact that purposeful discrimination against even one black venireman without adequate race-neutral explanation violates Batson. Alonzo Houston v. Alabama, Ala. S.Ct. 86-616 (1987), cert. granted, United States S.Ct. No. 86-7126 (May 1988). Consequently, the prosecution failed to meet its burden in rebutting the Petitioner's prima facie case of purposeful discrimination against the black jury veniremen. The jury selection process in Lynn deprived the Petitioner of his Sixth Amendment right to trial by a jury representative of a fair cross-section of the community and of his Fourteenth Amendment right to equal protection of the laws. As Justice Jones of the Alabama Supreme Court in his special concurrence so elequently stated, "How long, oh,

how long will we persist in the hollow notion that black jurors are less likely to convict criminally accused black defendants than are white jurors to convict white defendants?" Ex parte Lynn, 543 So.2d 709, 714 (Ala. 1988). As the answer to this question, and for all of the above reasons, the Petitioner, Frederick Lynn, respectfully urges this Honorable Court to order the Courts below to set aside his conviction and sentence as a matter of law.

CONCLUSION

For the prejudicial errors and denials of constitutional rights guaranteed by the Alabama and United States Constitution, the Petitioner respectfully urges this Honorable Court to grant the Writ of Certiorari, set aside his conviction, and grant such other relief as the Court may deem necessary and appropriate.

Respectfully submitted,

TURBERVILLE & ANDREWS, P.C.

L. DAN TURBERVILLE
Attorney for the Petitioner
1117 22nd Street South
Birmingham, AL 35205
(205) 939-0000

89-5503

CERTIFICATE OF SERVICE

I do hereby certify that I have served a copy of the foregoing Writ of Certiorari upon Honorable Don Siegelman, Attorney General for the State of Alabama, by placing a copy of same in the U.S. Mail, first class postage prepaid this the 31 day of August, 1989.

J. Don Zimberville

App. 1

defendant had seven (7) prior felony convictions."

"The elements of an action against an attorney in his professional capacity for negligence are essentially no different from those of any other negligence suit. *Malloy v. Sullivan*, 387 So.2d 169 (Ala. 1980). To recover, the appellant must prove a duty, a breach of duty, that the breach was the proximate cause of the injury, and damages."

Herston v. Whitesell, 348 So.2d 1054 (Ala. 1977).

[1] In reviewing the only evidence presented, we cannot say the trial court committed error in finding against appellant on the negligent malpractice claim.

[2] We also observe that under the proof, appellant was awarded all damages under the contract count to which he would have been entitled under the negligent malpractice count. Neither theory would have supported damages for mental anguish.

"There can be no recovery for emotional distress, where [the legal malpractice] does not involve any affirmative wrongdoing but merely neglect of duty, and the client may not recover for mental anguish where the contract which was breached, was not predominantly personal in nature."

7A C.J.S. *Attorney and Client* § 273a (1987), p. 505.

Under the breach of contract count the court awarded appellant $6,500 damages, being the total amount of the fee paid by appellant to appellee for representation in the criminal case which resulted in the conviction.

As to appellant's claim for damages for mental anguish under the contract count, the Supreme Court said in *B & M Homes, Inc. v. Hogan*, 376 So.2d 667 (Ala.1979):

"In Alabama the general rule is that mental anguish is not a recoverable element of damages arising from breach of contract. *Sanford v. Western Life Insurance Co.*, 368 So.2d 260 (Ala.1979); *Stead v. Blue Cross-Blue Shield of Alabama*, 346 So.2d 1140 (Ala.1977)."

Appellant has not shown that he comes within the narrow exceptions to this general rule. *See, F. Becker Asphaltum Roofing Co. v. Murphy*, 224 Ala. 655, 141 So. 630 (1932); *Birmingham Water Works Co. v. Ferguson*, 164 Ala. 494, 51 So. 150 (1909).

With respect to appellant's final contention that the trial court erred in not finding against the partners of appellee, suffice it to say that there was a total failure of proof on the question of partnership.

Based on the foregoing, the judgment of the trial court is due to be, and is, affirmed.

The foregoing opinion was prepared by Retired Circuit Judge J. ED TEASE while serving on active duty status as a judge of this court under the provisions of section 12-18-10(e), Code 1975, and this opinion is hereby adopted as that of the court.

AFFIRMED.

All the Judges concur.

Fredrick LYNN

v.

STATE.

4 Div. 698.

Court of Criminal Appeals of Alabama.

March 10, 1987.

On Return to Remand June 9, 1987.

Rehearing Denied July 28, 1987.

Defendant was convicted of capital murder by the Circuit Court, Barbour County, Jack W. Wallace, J., and defendant appealed. The Court of Criminal Appeals, 477 So.2d 1365, affirmed. On certiorari, the Supreme Court, 477 So.2d 1385, reversed and remanded, which was reversed and remanded by the Court of Criminal Appeals, 477 So.2d 1388. On remand, de-

fendant was again convicted der by the Circuit Court, appealed from second conv tence. The Court of Cri Bowen, P.J., held that: (1) is prosecutor engaged in purp nation in his peremptory ju quired remand; (2) defend to mayor as juror was proper (3) sentence of death was aggravating and mitigating On return to remand, the Co Appeals further held that not engage in purposeful di his exercise of his peremptor though all black potential ju cluded from panel.

Affirmed.

And judgment affirmed 2d 709.

1. Criminal Law ⇐1181.5(

Issue of whether prose ally excluded black jurors by ry jury strikes required rem tiary hearing for determ whether facts established p of purposeful discriminatio prosecution could come forv neutral explanations for its

2. Jury ⇐83(3)

Defendant's challenge f ror, who was mayor of town der was committed, was p where there was no showi actually exercised his superv over police officers during i that he participated in inve

3. Jury ⇐79(3)

Defendant's motion in n random reduction of jury par would ensure that some bla jury was properly denied, as not entitled to petit jury com or in part of persons of

4. Jury ⇐136(5)

Defendant's motion in n be allowed two jury strikes State received was properly

fendant was again convicted of capital murder by the Circuit Court, and defendant appealed from second conviction and sentence. The Court of Criminal Appeals, Bowen, P.J., held that: (1) issue of whether prosecutor engaged in purposeful discrimination in his peremptory jury strikes required remand; (2) defendant's challenge to mayor as juror was properly denied; and (3) sentence of death was proper given aggravating and mitigating circumstances. On return to remand, the Court of Criminal Appeals further held that prosecutor did not engage in purposeful discrimination in his exercise of his peremptory jury strikes, though all black potential jurors were excluded from panel.

Affirmed.

And judgment affirmed, Ala., 543 So. 2d 709.

1. Criminal Law ⇐1181.5(3)

Issue of whether prosecutor intentionally excluded black jurors by his peremptory jury strikes required remand for evidentiary hearing for determination as to whether facts established prima facie case of purposeful discrimination and whether prosecution could come forward with race-neutral explanations for its strikes.

2. Jury ⇐83(3)

Defendant's challenge for cause of juror, who was mayor of town in which murder was committed, was properly denied, where there was no showing that mayor actually exercised his supervisory authority over police officers during investigation or that he participated in investigation.

3. Jury ⇐79(3)

Defendant's motion in murder trial for random reduction of jury panel to level that would ensure that some blacks served on jury was properly denied, as defendant was not entitled to petit jury composed in whole or in part of persons of his own race.

4. Jury ⇐136(5)

Defendant's motion in murder trial to be allowed two jury strikes for each strike State received was properly denied.

5. Criminal Law ⇐1168(2)

State investigator's description of rooms in murder victim's house as "ransacked," was merely summary of his other testimony and cumulative to other evidence of condition of rooms in victim's home, including photographs, and thus, did not require reversal.

6. Witnesses ⇐240(4)

Prosecutor was permitted to ask state witness whether he knew victim was killed on particular date, though such question was leading question, where date had been established by testimony of prior witnesses, date was not contested issue at trial, and witness testified that he was not familiar with date.

7. Criminal Law ⇐730(7)

Prosecutor's statement in closing argument that he believed accomplice's statements that defendant killed victim, if error due to injection of prosecutor's personal opinion and knowledge into case, was harmless when trial judge immediately instructed jury that they should disregard comments.

8. Homicide ⇐354

Sentence of defendant to death for burglary and murder was proper sentence and was neither excessive nor disproportionate to penalty imposed in similar cases, considering both aggravating and mitigating circumstances, crimes, and defendant.

On Return To Remand

9. Jury ⇐33(5.1), 121

Prima facie case of purposeful discrimination was established by fact that prosecutor struck all blacks from jury panel, but prosecutor explained reasons for striking all black persons from jury for race-neutral purposes and thus, prosecutor did not engage in purposeful racial discrimination.

Donald J. McKinnon, Eufaula, for appellant.

Don Siegelman, Atty. Gen., and P. David Bjurberg and William D. Little, Asst. Attys. Gen., for appellee.

BOWEN, Presiding Judge.

In 1983, sixteen-year-old Fredrick Lynn was convicted and sentenced to death for the capital offense involving burglary and the murder of Marie Driggers Smith. Alabama Code 1975, § 13A-5-31(a)(4). That conviction and sentence were reversed on appeal. *Lynn v. State*, 477 So.2d 1365 (Ala.Cr.App.1984), reversed, *Ex parte Lynn*, 477 So.2d 1385 (Ala.1985).

On remand, *Lynn v. State*, 477 So.2d 1388 (Ala.Cr.App.1985), Lynn was retried and again convicted and sentenced to death. This appeal is from that second conviction and sentence.

I

On the issue of the alleged use of racial discrimination by the prosecutor in his peremptory jury strikes, the parties agree that this case is controlled by *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed. 2d 69 (1986). See *Griffith v. Kentucky*, 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987), and *Ex parte Jackson*, 516 So.2d 768 (Ala.1986).

[1] Our independent review of the record convinces us of the propriety of the Attorney General's recommendation that this cause be remanded for an evidentiary hearing on this issue. Therefore, it is the judgment of this Court that this cause be remanded to the Circuit Court of Barbour County with directions that an evidentiary hearing be conducted. The trial court should determine whether or not the facts establish a prima facie case of purposeful discrimination. If a prima facie case of purposeful discrimination is established and the prosecution does not come forward with race-neutral explanations for its strikes, then Lynn is entitled to a new trial. If the trial judge finds that there was no purposeful discrimination involved in the selection of the jury, he is directed to forward to this Court a transcript of the evidentiary hearing together with a report of his factual findings.

II

The defendant's challenge for cause of venireman Little was properly denied. Little had been the mayor of Eufaula and in that capacity had exercised "supervisory authority" over Captain Ted Dotson and Lieutenant Earlie Dinkins of the Eufaula Police Department. Both officers participated in the investigation of the crime for which Lynn was convicted and both testified at his trial. Little indicated that having served in that supervisory capacity over the officers would not affect his ability to render a fair and just verdict.

[2] In the absence of any showing that Mayor Little actually exercised his "supervisory authority" over the officers at any time during the investigation or that he participated in the investigation, we find that the challenge for cause was properly denied. See *Lowe v. State*, 384 So.2d 1164, 1171 (Ala.Cr.App.), cert. denied, *Ex parte Lowe*, 384 So.2d 1171 (Ala.1980) (The fact that the venire person was employed by the district attorney's office did not alone impute bias as a matter of law.); *Nettles v. State*, 435 So.2d 146 (Ala.Cr.App.), affirmed, *Ex parte Nettles*, 435 So.2d 151, 152–53 (Ala.1983) (Employment of a prospective juror by the victim of a crime, though not a party to the subsequent criminal prosecution, does not in itself give rise to an implied bias as a matter of law and, hence, does not provide a ground for automatic disqualification of the juror for cause.).

III

[3] Lynn's motion for a random reduction of the jury panel to a level that would ensure that some blacks served on the jury was properly denied. While a defendant has a right to be tried by a jury whose members are selected "pursuant to nondiscriminatory criteria", *Batson*, 476 U.S. at 86, 106 S.Ct. at 1717, "a defendant has no right to a 'petit' jury composed in whole or in part of persons of his own race." *Batson*, 476 U.S. at 85, 106 S.Ct. at 1716, quoting *Strauder v. West Virginia*, 10 Otto 303, 100 U.S. 303, 305, 25 L.Ed. 664 (1880).

IV

[4] Lynn's motion to
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So.2d at 1377. See also
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L.Ed.2d 1374 (1983).

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[6] The trial court did n
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Bradford v. Stanley, 355
(Ala.1978).

Furthermore, the witness
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IV

[4] Lynn's motion to be allowed two jury strikes for each strike the State received was properly denied. *Lynn*, 477 So.2d at 1377. See also *Robinson v. State*, 428 So.2d 148, 152 (Ala.Cr.App.1982), cert. denied, 462 U.S. 1137, 103 S.Ct. 3122, 77 L.Ed.2d 1374 (1983).

V

[5] State Investigator A.G. Tew was properly permitted to describe the condition of the rooms in the victim's house and testify that "they were ransacked." The investigator's opinion was, in this case, merely a statement of "collective fact" or a "shorthand rendition of fact[s]." *Murrell v. State*, 377 So.2d 1102, 1106 (Ala.Cr. App.), cert. denied, *Ex parte Murrell*, 377 So.2d 1108 (Ala.1979). See also *Kozlowski v. State*, 248 Ala. 304, 306, 27 So.2d 818 (1946). We view his use of the word "ransacked" as merely a summary of his other testimony and cumulative to the other evidence of the condition of the rooms in the victim's house, especially the photographs.

VI

[6] The trial court did not err in allowing the prosecutor to ask state witness Herbert Bouier, "Do you know [Marie Driggers Smith] was killed on February 5th of [1981]?" Since the date of the victim's death had already been established by the testimony of prior witnesses and since that date was never a contested issue at trial, the trial court did not abuse its discretion in allowing the leading question. "[T]he trial judge has discretion to allow some leading questions, especially since prior testimony is simply being repeated." *Brown Mechanical Contractors, Inc. v. Centennial Ins. Co.*, 431 So.2d 932, 944 (Ala.1983). "Whether to allow or disallow a leading question is within the discretion of the trial court and except for a flagrant violation there will not be reversible error." *Bradford v. Stanley*, 355 So.2d 328, 331 (Ala.1978).

Furthermore, the witness testified that he was not familiar with the date

VII

[7] In closing argument to the jury, the district attorney stated that, when accomplice Strong "laid it on the line on September 23, 1982, without any promising or any help from anybody and *told me* who pulled that trigger, *I believed it.*" (Emphasis added.) Even if we consider this argument improper because it injects the prosecutor's personal opinion and knowledge into the case, *Clark v. State*, 462 So.2d 743, 746–48 (Ala.Cr.App.1984), the error was cured when the trial judge immediately instructed the jury that "the District Attorney's statement that he believes that particular part of the testimony is ..., improper, and I'll ask you to disregard that and not consider that in arriving at your verdict." *Chambers v. State*, 382 So.2d 632, 634 (Ala.Cr. App.), cert. denied, *Ex parte Chambers*, 382 So.2d 636 (Ala.1980).

VIII

Lynn raises four issues which this Court addressed on his first appeal. We have reviewed those alleged errors within the context of Lynn's second conviction and find that our prior opinion adequately answers each issue.

Therefore, we find (1) that Lynn was not convicted on the uncorroborated testimony of an accomplice, *Lynn*, 477 So.2d at 1369–71; (2) that Investigator Tew's testimony that he did not notify witness Green prior to going to Spain to interview him did nothing to enhance Green's credibility, *Lynn*, 477 So.2d at 1379; (3) that the admission of the sawed-off barrel portion of a .20-gauge shotgun was proper, *Lynn*, 477 So.2d at 1372–73; and (4) that the Alabama Death Penalty Statute under which Lynn was convicted is constitutional, *Lynn*, 477 So.2d at 1378.

IX

Pursuant to A.R.A.P., Rule 45A, we have searched the record and found no error that has or probably has affected the substantial right of the appellant.

The following three considerations are made pursuant to the requirements of *Beck*

v. State, 396 So.2d 645, 664 (Ala.1980). (1) Lynn was indicted and convicted for an offense which is a capital offense by statutory definition. *Lynn*, 477 So.2d at 1380. (2) "Similar crimes are being punished capitally throughout Alabama." *Lynn*, 477 So. 2d at 1380. See *Grayson v. State*, 479 So.2d 69 (Ala.Cr.App.1984), affirmed, *Ex parte Grayson*, 479 So.2d 76 (Ala.), cert. denied, *Grayson v. Alabama*, 474 U.S. 865, 106 S.Ct. 189, 88 L.Ed.2d 157 (1985) (nighttime burglary/intentional killing under § 13A-5-31[a][4]); *Kennedy v. State*, 472 So.2d 1092 (Ala.Cr.App.1984), affirmed, *Ex parte Kennedy*, 472 So.2d 1106 (Ala.), cert. denied, *Kennedy v. Alabama*, 474 U.S. 975, 106 S.Ct. 340, 88 L.Ed.2d 325 (1985) (nighttime burglary/intentional killing under § 13A-5-31[a][4]); *Clisby v. State*, 456 So. 2d 86 (Ala.Cr.App.1982), reversed on other grounds, *Ex parte Clisby*, 456 So.2d 95 (Ala.1983) (nighttime burglary/intentional killing under § 13-11-2[a][4]); *Lindsey v. State*, 456 So.2d 383 (Ala.Cr.App.1983), affirmed, *Ex parte Lindsey*, 456 So.2d 393 (Ala.1984), cert. denied, *Lindsey v. Alabama*, 470 U.S. 1023, 105 S.Ct. 1384, 84 L.Ed.2d 403 (1985) (burglary/murder under § 13A-5-40[a][4]). (3) The death sentence is appropriate in relation to this appellant. See *Lynn*, 477 So.2d at 1380. As in the original trial, the trial judge again found the existence of only one aggravating and one mitigating circumstance. See *Lynn*, 477 So.2d at 1380.

[8] Pursuant to § 13A-5-53, Code of Alabama 1975, we make the following findings: (1) Other than the allegations of racial discrimination in the selection of the jury, see Issue I of this opinion, there is no evidence that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor. (2) Our independent weighing of the aggravating and mitigating circumstances indicates that death is the proper sentence. (3) The sentence of death is neither excessive nor disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

This cause is remanded to the Circuit Court of Barbour County for the reason stated in Issue I of this opinion.

REMANDED WITH DIRECTIONS.

All Judges concur.

ON RETURN TO REMAND

BOWEN, Presiding Judge.

[9] On remand, the trial court fully complied with the order of this Court. In consideration of *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), an evidentiary hearing was held after which the trial court issued a written order in which it made the following findings of fact:

"1. That a prima facie case of purposeful discrimination was established by the fact that the strike list affirmatively shows that the prosecution struck all of the blacks from the venire. The Court then called on the prosecution for its reasons for its strikes.

"2. That the District Attorney, Sam A. LeMaistre, Jr., explained the reasons that he struck every black from the jury and that each and every reason that he gave was race-neutral. Further, the reasons given were sufficient for any competent attorney to strike that particular venireman.

"3. The Court further finds that the testimony given by the District Attorney was truthful and that there was no purposeful racial discrimination involved in the selection of the jury that tried the above named defendant and the defendant is not entitled to a new trial, it is; "THEREFORE, ORDERED that a new trial for the defendant Frederick Lynn be and the same is hereby denied."

At that hearing, the District Attorney testified, under oath, and the trial court allowed defense counsel to cross-examine the witness. The District Attorney's stated reasons for striking the eleven black persons from the jury venire are as follows: (1) The juror was the brother of a man the District Attorney had criminally prosecuted and convicted "on several occa-

sions" and the brother of another man against whom the District Attorney's Office was "presently enforcing child support." (2) The juror's husband was related to the defendant's father. (3) The juror was twenty-five years old and "reputed to be connected with druga." His father had a felony record and had been convicted of a drug related offense. The juror also lived in the same area of the county as did the lead defense counsel. (4) The juror lived in an area where the defendant was living at the time of the crime and where the defendant's au nt and grandmother had lived for "numerous years." (5) The juror was a co-employee of the father of Gary Marcus Strong, an accomplice and co-defendant and a key witness against the defendant. Strong had a "bad reputation" and had pleaded guilty "to a crime in connection with [the] crime" for which the defendant was being tried. If the juror knew of Strong, he might not believe his testimony. Additionally, a small community was involved and the juror's name was Jackson. The District Attorney had prosecuted and convicted eight people named Jackson in the past eight years. The District Attorney suspected that the juror might be related to one of those convicts. (6) The juror was twenty-eight years old, unemployed, and lived close to a city magistrate. The lead defense counsel was the city clerk and the mayor assisted defense counsel in striking the jury. (7) The juror lived one block from co-defendant Strong. The District Attorney "felt that anyone that knew [Strong] might doubt what he was telling even though he was under oath." The juror also lived in "a very high crime district" and might "not be as shocked or opposed to crime because of those things." (8) The juror was a neighbor of the defendant's grandmother and aunt and lived in close proximity to the defendant when the crime was committed. (9) The juror was a friend of, and worked with, the wife of the father of the defendant. (10) The eighty-year-old juror appeared "feeble and hard of hearing" and "somewhat weak on death qualifications." (11) The juror was twenty-three years old, had a child fathered by co-defendant's Strong's brother, and was related by marriage to a state investigator who would testify as a witness. The investigator felt she would not be favorable to the State's case.

Our independent review of the record supports the findings of the trial court. The judgment of that court is affirmed.

OPINION EXTENDED; AFFIRMED.

All Judges concur.

Ex parte Frederick LYNN.

(Re Frederick Lynn

v.

State).

86-1474.

Supreme Court of Alabama.

Dec. 30, 1988.

Defendant was convicted of capital murder by the Circuit Court, Barbour County, Jack W. Wallace, J. Defendant appealed. The Court of Criminal Appeals, 477 So.2d 1365, affirmed. On certiorari, the Supreme Court, 477 So.2d 1385, reversed and remanded. After remandment, the Court of Criminal Appeals, 477 So.2d 1388, reversed and remanded. On remand, defendant was retried, again convicted, and again sentenced to death. Defendant appealed. The Court of Criminal Appeals, 543 So.2d 704, reversed and remanded with directions to conduct evidentiary hearing on prosecutor's alleged use of racially discriminatory peremptory strikes. On remand, the Circuit Court determined that no purposeful discrimination was involved in the jury selection, and subsequently the Court of Criminal Appeals extended its opinion and affirmed. Writ of certiorari was issued. The Supreme Court, Steagall, J., held that: (1) finding that peremptory

App. 2
DUPLICATE

COURT OF CRIMINAL APPEALS
STATE OF ALABAMA
P.O. BOX 351
MONTGOMERY 36101

SAM TAYLOR
Presiding Judge
JOHN C. TYSON, III
WILLIAM M. BOWEN, JR.
JOHN PATTERSON
H. WARD McMILLAN
Judges

MOLLIE JORDAN
Clerk
(205) 261-4580

4 Div. 698 Barbour (CC-83-24) Circuit Court

Fredrick Lynn (Appellant) vs. State of Alabama (Appellee)

Dear Sir:

You are hereby notified that on July 28, 1987, the following indicated action was taken in the above-styled cause by the Court of Criminal Appeals of Alabama:

_____ Notice of Appeal filed. Future correspondence should refer to the above number.

_____ Record on Appeal filed. Date of Certificate of Completion of Record on Appeal: _____. As to briefs, see Rules 28, 31 and 32, A.R.A.P.

_____ On motion, record on appeal accepted and considered as timely filed in this Court.

_____ Appellant granted seven (7) additional days to file brief. Brief due on _____.

_____ Appellee granted seven (7) additional days to file brief. Brief due on _____.

_____ Appellant granted seven (7) additional days to file **reply** brief. Brief due on _____.

_____ Brief of Appellant filed. _____ Oral argument requested by appellant.

_____ Reply brief filed.

App. 3

to the Circuit
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pinion.
RECTIONS.

REMAND

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sions" and the brother of another man against whom the District Attorney's Office was "presently enforcing child support." (2) The juror's husband was related to the defendant's father. (3) The juror was twenty-five years old and "reputed to be connected with drugs." His father had a felony record and had been convicted of a drug related offense. The juror also lived in the same area of the county as did the lead defense counsel. (4) The juror lived in an area where the defendant was living at the time of the crime and where the defendant's aunt and grandmother had lived for "numerous years." (5) The juror was a co-employee of the father of Gary Marcus Strong, an accomplice and co-defendant and a key witness against the defendant. Strong had a "bad reputation" and had pleaded guilty "to a crime in connection with [the] crime" for which the defendant was being tried. If the juror knew of Strong, he might not believe his testimony. Additionally, a small community was involved and the juror's name was Jackson. The District Attorney had prosecuted and convicted eight people named Jackson in the past eight years. The District Attorney suspected that the juror might be related to one of those convicts. (6) The juror was twenty-eight years old, unemployed, and lived close to a city magistrate. The lead defense counsel was the city clerk and the mayor assisted defense counsel in striking the jury. (7) The juror lived one block from co-defendant Strong. The District Attorney "felt that anyone that knew [Strong] might doubt what he was telling even though he was under oath." The juror also lived in "a very high crime district" and might "not be as shocked or opposed to crime because of those things." (8) The juror was a neighbor of the defendant's grandmother and aunt and lived in close proximity to the defendant when the crime was committed. (9) The juror was a friend of, and worked with, the wife of the father of the defendant. (10) The eighty-year-old juror appeared "feeble and hard of hearing" and "somewhat weak on death qualifications." (11) The juror was twenty-three years old, had a child fathered by co-defendant's Strong's brother, and was related by marriage to a state investigator who would testify as a witness. The investigator felt she would not be favorable to the State's case.

Our independent review of the record supports the findings of the trial court. The judgment of that court is affirmed.

OPINION EXTENDED; AFFIRMED.

All Judges concur.

KEY NUMBER SYSTEM

Ex parte Frederick LYNN.

(Re Frederick Lynn

v.

State).

86-1474.

Supreme Court of Alabama.

Dec. 30, 1988.

Defendant was convicted of capital murder by the Circuit Court, Barbour County, Jack W. Wallace, J. Defendant appealed. The Court of Criminal Appeals, 477 So.2d 1365, affirmed. On certiorari, the Supreme Court, 477 So.2d 1385, reversed and remanded. After remandment, the Court of Criminal Appeals, 477 So.2d 1388, reversed and remanded. On remand, defendant was retried, again convicted, and again sentenced to death. Defendant appealed. The Court of Criminal Appeals, 543 So.2d 704, reversed and remanded with directions to conduct evidentiary hearing on prosecutor's alleged use of racially discriminatory peremptory strikes. On remand, the Circuit Court determined that no purposeful discrimination was involved in the jury selection, and subsequently the Court of Criminal Appeals extended its opinion and affirmed. Writ of certiorari was issued. The Supreme Court, Steagall, J., held that: (1) finding that peremptory

strikes were not racially motivated was not clearly erroneous; (2) during the evidentiary hearing, defendant was not entitled to cross-examine district attorney as to venirepersons he did not strike; and (3) defendant was not entitled to proportionate minority representation on jury.

Affirmed.

Maddox and Jones, JJ., concurred specially and filed opinions.

Adams, J., dissented in part and concurred in part.

1. Jury ⇐33(5.1)

Prosecutor's explanation for use of peremptory strikes need not rise to level justifying exercise of challenge for cause.

2. Criminal Law ⇐1158(3)
Jury ⇐121

Trial court has discretion to determine if the State's peremptory challenges of black jurors are motivated by intentional racial discrimination; moreover, trial court's findings as to whether defendant has established purposeful racial discrimination are to be accorded great deference on appeal and should be reversed only if they are clearly erroneous.

3. Jury ⇐120

Trial court was not clearly erroneous in determining that prosecutor's peremptory strikes were not racially motivated; reasons given by prosecutor for the strikes were very specific and included the following: fact that one venireperson's husband was related to defendant, fact that another venireperson had been prosecuted several times by the prosecutor, and fact that one venireperson worked with codefendant's father.

4. Jury ⇐33(5.1)

Result-oriented approach is not appropriate when determining whether the State has presented sufficient race-neutral reasons for its peremptory challenges.

5. Jury ⇐121

Defendant was not entitled to cross-examine district attorney as to venirepersons he did not strike, in evidentiary hearing on district attorney's alleged use of racially discriminatory peremptory jury strikes in capital murder prosecution.

6. Jury ⇐33(1.1)

Minority criminal defendant is not entitled to proportionate minority representation on jury in counties that have significant minority population.

Donald J. McKinnon, Eufaula, for petitioner.

Don Siegelman, Atty. Gen., and P. David Bjurberg and William D. Little, Asst. Attys. Gen., for respondent.

STEAGALL, Justice.

We issued the writ of certiorari to review the decision of the Court of Criminal Appeals in *Lynn v. State*, 543 So.2d 704 (Ala. Crim.App.1987), which affirmed Lynn's conviction for capital murder and the trial court's imposition of the death sentence. The writ was issued as a matter of right pursuant to Rule 39(c), A.R.App.P.

The facts of this case have been thoroughly set forth in previous opinions.[1] Suffice it to say that in 1983, 16-year-old Frederick Lynn was convicted in the Circuit Court of Barbour County and was sentenced to death for the capital offense involving burglary and the murder of Marie Driggers Smith.[2] The conviction and sentence were initially affirmed by the Court of Criminal Appeals, *Lynn v. State*, 477 So.2d 1365 (Ala.Crim.App.1984), but were then reversed by this Court, *Ex parte*

1. A short synopsis of the underlying facts may be found in the opening paragraphs of the initial reported opinion of the Court of Criminal Appeals: *Lynn v. State*, 477 So.2d 1365, 1369 (Ala.Cr.App.1984). A full account of the facts may be found in a written order of the trial court issued following Lynn's original sentencing hearing in 1983. This order appears in its entirety as appended to the initial opinion of the Court of Criminal Appeals, id. at 1381-84.

2. Ala.Code 1975, § 13A-5-31(a)(4).

Lynn, 477 So.2d 1385 (
mand, Lynn was retried
and again sentenced to c
the Court of Criminal A
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County with directions t
dentiary hearing on the
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emptory jury strikes.
tucky, 476 U.S. 79, 106 S.
2d 69 (1986). On remand
conducted such a hearing
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discrimination was establi
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venire, the reasons advanc
cutor for the strikes were
therefore rebutted the *pr*
Determining that no purpos
tion was involved in the s
jury, the trial court accord
that Lynn was not entitled
On return to remand, the C
Appeals extended its opinio
the judgment of the trial c
petition in this Court follow

I

As previously indicated,
Criminal Appeals, on return
cepted the findings of the tr
the prosecutor's peremptory
were not racially motivated
tends that those findings are
are due to be reversed under
of *Batson v. Kentucky*, supr

At the hearing on remand,
attorney, testifying under oa
his reasons for the use of
peremptory strikes of black ve
Lynn asserts that those reason
cient under the holding of *Ba*
because the reasons given, h
inherently vague and could a
member of the jury venire. 1

3. In that decision this Court held
was required based upon the trial
ing of the State's motion *in limin*
cluded any inquiry for impeachm
by defense counsel concerning
record of a prosecution witness (Ga
Strong) who was also an admitted a
the crime.

Lynn, 477 So.2d 1385 (Ala.1985).[3] On remand Lynn was retried, again convicted, and again sentenced to death. On appeal, the Court of Criminal Appeals remanded the cause to the Circuit Court of Barbour County with directions to conduct an evidentiary hearing on the prosecutor's alleged use of racially discriminatory peremptory jury strikes. *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed. 2d 69 (1986). On remand, the trial court conducted such a hearing, finding that although a *prima facie* case of purposeful discrimination was established, in that the prosecution struck all blacks from the jury venire, the reasons advanced by the prosecutor for the strikes were race-neutral and therefore rebutted the *prima facie* case. Determining that no purposeful discrimination was involved in the selection of the jury, the trial court accordingly concluded that Lynn was not entitled to a new trial. On return to remand, the Court of Criminal Appeals extended its opinion and affirmed the judgment of the trial court.[4] Lynn's petition in this Court followed.

I

As previously indicated, the Court of Criminal Appeals, on return to remand, accepted the findings of the trial court that the prosecutor's peremptory jury strikes were not racially motivated. Lynn contends that those findings are erroneous and are due to be reversed under the rationale of *Batson v. Kentucky*, supra.

At the hearing on remand the district attorney, testifying under oath, set forth his reasons for the use of each of his peremptory strikes of black venirepersons. Lynn asserts that those reasons are insufficient under the holding of *Batson*, supra, because the reasons given, he says, are inherently vague and could apply to any member of the jury venire. Lynn, moreover, asserts that it is no coincidence, and that racial discrimination is clearly demonstrated, when all 11 blacks out of a qualified panel of 38 prospective jurors are eliminated by the prosecutor's peremptory strikes. Lynn also maintains, as a general proposition, that because the reasons given by prosecutors to justify their peremptory strikes are usually vague and numerous, appellate courts should utilize a "result-oriented" approach in evaluating whether the State has presented sufficient race-neutral reasons for its peremptory challenges. We have carefully reviewed the record on remand and find these contentions to be without merit.

The record shows that the reasons given by the district attorney for his peremptory strikes in this case are very specific and are not generally applicable to any number of other persons; those reasons arose from the particular facts of this case. They ranged from the fact that one venireperson's husband was related to the defendant; another one had been prosecuted several times by the district attorney in this case; another worked with the co-defendant's father; and two others lived in the same neighborhood as the defendant's grandmother and aunt. Another venireperson was connected with drugs and was from the same county as the defense attorney; one was 80 years old, feeble, hard of hearing, and did not seem to favor the death penalty; one worked with and was a friend of the defendant's stepmother; and another lived one street over from the co-defendant. Finally, two of the prospective jurors were quite young, one of them living near a person who worked with the defense attorney (the defense attorney was also the Eufaula city clerk), and the other being a classmate of the co-defendant as well as having a child by the co-defendant's brother.

3. In that decision this Court held that reversal was required based upon the trial court's granting of the State's motion *in limine*, which precluded any inquiry for impeachment purposes by defense counsel concerning the juvenile record of a prosecution witness (Garrett Marcus Strong) who was also an admitted accomplice to the crime.

4. Because the hearing on remand in this case complies procedurally with *Batson*, supra, a second hearing under the criteria established by this Court in *Ex parte Branch*, 526 So.2d 609 (Ala.1987), is not required. *Scales v. State*, 537 So.2d 1074 (Ala.1988).

On cross-examination by defense counsel, no inconsistency was revealed between the district attorney's stated reasons in this case and his practice in striking generally. The district attorney also testified that he "struck around" certain people that he trusted and wanted on the jury.

[1–4] Although Lynn argues that the reasons the district attorney gave for his peremptory strikes of three venirepersons are suspect, we note that "the prosecutor's explanation need not rise to the level justifying exercise of a challenge for cause." *Batson*, supra, 476 U.S. at 97, 106 S.Ct. at 1723. It is within the sound discretion of the trial court to determine if the State's peremptory challenges of black jurors are motivated by intentional racial discrimination. *Ex parte Jackson*, 516 So.2d 768 (Ala.1986). Moreover, the trial court's findings as to whether the defendant has established purposeful racial discrimination are to be accorded great deference on appeal, *Batson*, supra, 476 U.S. at 98, 106 S.Ct. at 1724, and should be reversed on appeal only if they are clearly erroneous. *Ex parte Branch*, 526 So.2d 609 (Ala.1987).

Based on the foregoing, we find no "clear error" in the trial court's determination. Moreover, we decline to articulate the mechanical result-oriented approach urged by Lynn, for such a procedure is not contemplated by the holding in *Batson*, supra.

II

[5] Lynn next argues that the sincerity of the race neutral reasons advanced by the district attorney to justify his strikes of prospective black jurors cannot be fully evaluated by the trial court in the absence of extensive cross-examination by defense counsel. This assignment of error is predicated on the trial court's disallowance of two questions, one in part and the other in its entirety, directed to the district attorney on cross-examination.

Although the trial court permitted full cross-examination of the district attorney regarding the persons who actually served on the jury, it disallowed questions as to whether the same reasons advanced by the district attorney for striking certain blacks would be applicable to potential jurors struck by the defendant.[5] Lynn thus argues that prosecutors should be required not only to give specific reasons for striking potential black jurors, but also to demonstrate why certain venirepersons were not struck. Such a right of unlimited cross-examination would be a substantial expansion of the holding in *Batson*, supra, and we decline to adopt it. We conclude that the trial court did not err in refusing to permit Lynn to cross-examine the district attorney as to venirepersons he did *not* strike.

III

[6] Lynn's third argument is that the trial court erred in denying his motion that the court order the district attorney not to use his peremptory strikes in such a manner as to exclude all blacks from the jury. Lynn proposes that this Court adopt a rule that would require, for the benefit of minority criminal defendants, proportionate minority representation on juries in counties that have a significant minority population.

Lynn's reliance on *Batson* for these arguments is misplaced. In *Batson*, the United States Supreme Court held that striking black venirepersons on the basis of race is improper; striking black venirepersons for non-racial reasons is not improper, however, even if it results in a jury that contains no blacks. "[A] defendant has no right to a 'petit jury composed in whole or in part of persons of his own race.'" *Batson*, supra, 476 U.S. at 85, 106 S.Ct. at 1719, quoting *Strauder v.* 100 U.S. 303, 25 L.Ed. 664 fore, Lynn's motion was c and we decline to adopt th representation rule Lynn u

IV–XIV

The remaining issues Ly substantially the same issu presented to the Court of Cri We have carefully reviewe thoroughly scrutinized the h Court of Criminal Appeals, a the propriety of the death p case pursuant to Ala. § 13A–5–53(a). We find that errors adversely affecting L

Accordingly, the judgment of Criminal Appeals is due to

AFFIRMED.

TORBERT, C.J., and ALMO SHORES and HOUSTON, JJ.,

MADDOX and JONES, JJ., specially.

ADAMS, J., dissents as to but concurs as to the remaind the opinion.

MADDOX, Justice (concurrir specially).

The law reads as follows:

"After a prima facie case lished, there is a presumptio peremptory challenges were u criminate against black jurors 476 U.S. at 97, 106 S.Ct. at state then has the burden of a *a clear, specific, and legitima for the challenge which rela particular case to be tried, an nondiscriminatory. Batson*, at 97, 106 S.Ct. at 1723. How showing need not rise to the challenge for cause. *Jackson*, 768 (Ala.1986); *[State v.] Nei* 2d [481] at 487 [(1984)]; *[P Wheeler*, 22 Cal.3d [258] at 28 P.2d [748] at 765, 148 Cal.Rptr 906 [(1978)].

* * * *

5. The defense attorney's question that was disallowed in part by the trial court was as follows:

"Q: All right. Now among the individuals that you did not strike, were there not some whose relatives you had prosecuted?"

The trial court limited this question to those persons who served on the jury. The question that was entirely disallowed by the trial court was as follows:

"Q: Even though I'm the one that actually struck her, did you have Linda Benefield listed as one that you intended to strike?"

1719, quoting *Strauder v. West Virginia,* 100 U.S. 303, 25 L.Ed. 664 (1879). Therefore, Lynn's motion was correctly denied, and we decline to adopt the proportionate representation rule Lynn urges.

IV–XIV

The remaining issues Lynn raises are substantially the same issues that were presented to the Court of Criminal Appeals. We have carefully reviewed the record, thoroughly scrutinized the holding of the Court of Criminal Appeals, and considered the propriety of the death penalty in this case pursuant to Ala.Code 1975, § 13A–5–53(a). We find that there were no errors adversely affecting Lynn's rights.

Accordingly, the judgment of the Court of Criminal Appeals is due to be affirmed.

AFFIRMED.

TORBERT, C.J., and ALMON, SHORES and HOUSTON, JJ., concur.

MADDOX and JONES, JJ., concur specially.

ADAMS, J., dissents as to Part I but concurs as to the remainder of the opinion.

MADDOX, Justice (concurring specially).

The law reads as follows:

"After a prima facie case is established, there is a presumption that the peremptory challenges were used to discriminate against black jurors. *Batson,* 476 U.S. at 97, 106 S.Ct. at 1723. The state then has the burden of articulating a *clear, specific, and legitimate* reason for the challenge *which relates to the particular case to be tried, and which is nondiscriminatory. Batson,* 476 U.S. at 97, 106 S.Ct. at 1723. However, this showing need not rise to the level of a challenge for cause. *Jackson,* [516 So.2d 768 (Ala.1986)]; [*State v.*] *Neil,* 457 So. 2d [481] at 487 [(1984)]; [*People v.*] *Wheeler,* 22 Cal.3d [258] at 281–82, 583 P.2d [748] at 765, 148 Cal.Rptr. [890] at 906 [(1978)].

* * * *

"*Batson* makes it clear ... that '[t]he State cannot meet this burden on mere general assertions that its officials did not discriminate or that they properly performed their official duties. Rather, the State must demonstrate that "permissible racially neutral selection criteria and procedures have produced the monochromatic result."' *Batson,* 476 U.S. at 94, 106 S.Ct. at 1721, citing *Alexander v. Louisiana,* 405 U.S. 625, 632, 92 S.Ct. 1221, 1226, 31 L.Ed.2d 536 (1972). Furthermore, intuitive judgment or suspicion by the prosecutor is insufficient to rebut the presumption of discrimination. *Batson,* 476 U.S. at 97, 106 S.Ct. at 1723. Finally, a prosecutor cannot overcome the presumption 'merely by denying any discriminatory motive or "affirming his good faith in individual selections."' *Batson,* 476 U.S. at 98, 106 S.Ct. at 1723, citing *Alexander,* 405 U.S. at 632, 92 S.Ct. at 1226." (Emphasis added.)

Ex parte Branch, 526 So.2d 609, 623 (Ala. 1987).

I was almost persuaded to dissent in this case because it appeared that the State had failed to meet its burden of giving "clear, specific and legitimate" reasons for challenging several black persons on the venire. I concur in the result only because I am not convinced that the prosecutor and the trial judge failed to carry out their responsibilities under *Batson.* Also, after the state gave its reasons for the challenges, the petitioner failed to show that other venire persons having the same characteristics were not challenged.

The record shows that the prosecutor, under oath, stated that he had no discriminatory purpose when he exercised his peremptory challenges, and the trial court specifically found that "the testimony given by the District Attorney was truthful and that there was no purposeful racial discrimination involved in the selection of the jury that tried [the case]."

In view of this finding by the trial judge, I agree with the result reached, because the Supreme Court of the United States, in *Batson,* in footnote 21, 476 U.S. at 98, 106 S.Ct. at 1724, did state that "[s]ince the

trial judge's findings ... largely will turn on evaluation of credibility, a reviewing court *ordinarily*[1] should give those findings great deference" (emphasis added).

"I must hasten to add, however, that compliance in this case was, at most, minimal. Some of the reasons given by the district attorney are somewhat similar to those set out by Mr. Justice Marshall in his special concurring opinion in *Batson,* where he expressed fears that the *Batson* mandate might not be followed by prosecutors and trial judges. Mr. Justice Powell tried to allay Mr. Justice Marshall's fears. In footnote 21, 476 U.S. at 98, 106 S.Ct. at 1724, he wrote that ordinarily "great deference" [illegible] to the findings of fact made by the trial judge, and he addressed [illegible] the fears expressed by Mr. Justice Marshall that prosecutors and trial judges would not enforce *Batson,* by stating the following in footnote 22, 476 U.S. at [illegible] S.Ct. at 1724:

"While we respect the views expressed in Justice Marshall's concurring opinion, concerning prosecutorial and judicial enforcement of our holding today, we do not share them. The standard we adopt under the federal Constitution is designed to assure that a State does not use peremptory challenges to strike any black juror because of his race. We have no reason to believe that prosecutors will not fulfill their duty to exercise their challenges only for legitimate purposes. Certainly, this Court may assume that trial judges, in supervising voir dire in light of our decision today, will be alert to identify a prima facie case of purposeful discrimination. Nor do we think that this historic trial practice, which long has served the selection of an impartial jury, should be abolished because of an apprehension that prosecutors and trial judges will not perform conscientiously their respective duties under the Constitution."

It is apparent that the United States Supreme Court expressed great confidence that prosecutors and trial judges would "perform conscientiously their respective duties under the Constitution," and I share that confidence.

While some of the race-neutral reasons stated by the prosecutor in this case are not as clear and specific as they might have been, and while some of them are quite similar to the examples set out by Mr. Justice Marshall in his special concurring opinion in *Batson,* I cannot say that the trial judge was clearly wrong in denying the petitioner a new trial. But I must point out again that I believe that this case only minimally complies with the requirements of *Batson,* because there was very little *voir dire* directed to the challenged black jurors and therefore very little to indicate that they might be partial to the petitioner other than that they shared the same race. In this connection, let me say that I believe the Supreme Court, in *Batson,* placed particular emphasis on the value of *voir dire* in determining whether race-neutral reasons are [illegible] to support prosecutorial challenges. I would further point out that counsel for petitioner specifically asked that the trial judge limit the total number of the venire to 36—the minimum required by law—in order to limit the number of peremptory challenges available to the state.

JONES, Justice (concurring specially).

I agree completely with Justice Maddox's concurring opinion. I write separately to raise a "red flag": If the prosecuting attorneys of this State celebrate the opinion of affirmance in this case as a victory and heed not the obvious warnings, the ultimate result, in the not too distant future, will be the loss of all peremptory challenges in the criminal jury selection process.

This case, along with scores of others of like import, will furnish the requisite empirical data to prove Justice Marshall's worst fears and to make a mockery of Justice Powell's confidence that trial judges and prosecutors would "perform conscientiously their respective duties under the Constitution"—and the loss will be a tragedy, for the "peremptory challenge" procedure,

1. I note that the majority opinion omits the word "ordinarily" from its statement of the rule.

properly exercised, furnishes the ultimate best hope of insuring a fair and impartial trial. But it will, and should, give way, as did *Swain v. Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965), if we heed [illegible]'s "one last chance" and stubbornly persist in "doing business as usual."

[illegible] HOW LONG will we persist in the hollow notion that black jurors are less likely to convict criminally accused black defendants than are white jurors to convict white defendants? Rather than to face and accept reality, we choose to "play the game" of circumvention and risk the loss of a valuable and traditionally accepted [illegible] of jury selection.

[illegible] reasons, the answer lies not with this Court, but with the trial judges, who must [illegible] the prosecutor's use of the "intuitive judgment or suspicion" grounds for striking black jurors [illegible] a racially balanced [illegible] jury. It is the trial judges who are the last bastion of hope to preserve a fair jury selection system and still have a constitutional trial.

[illegible] HARMON

v.

STATE.

5 Div. 109.

Court of Criminal Appeals of Alabama.

May 12, 1987.

Rehearing Denied June 9, 1987

Defendant convicted of various offenses petitioned for writ of error coram nobis. The Circuit Court, Randolph County, Howard Bryan, J., denied petition after hearing, and petitioner appealed. The Court of Criminal Appeals, Patterson, J., held that issue of sentencing error, though potentially meritorious, had not been presented to trial court either in petition or at hearing and was thus not before Court for review.

Affirmed.

Judgment reversed, Ala., 543 So.2d 716, on remand, Ala.Cr.App., 543 So.2d 717.

Criminal Law ⇐1064(1)

Issue of sentencing court's error in imposing separate consecutive sentences on joint indictment when both charges stemmed from same act and one was part of the other, though potentially meritorious, had not been presented to trial court in petition for writ of error coram nobis or at hearing thereon and thus was not before Court of Criminal Appeals for review.

Charles Ned Wright, Wedowee, for appellant.

Charles A. Graddick, Atty. Gen., and Beth Slate Poe, Asst. Atty. Gen., for appellee.

PATTERSON, Judge.

The appellant, Truman Harmon, appeals from the trial court's denial, after a hearing, of his petition for writ of error coram nobis wherein he contested the validity of his 1985 convictions for escape in the second degree, burglary in the third degree, and theft of property in the second degree, entered pursuant to pleas of guilty. On appeal, his appointed counsel submitted the following issue for our review:

> "Whether the Court erred in sentencing the Defendant to separate sentences of thirteen years each (running consecutive) for Third Degree Burglary and Second Degree Theft on a joint indictment when both charges stemmed from the same act and the Second Degree Theft was a part of the Third Degree Burglary offense to the prejudice of the Defendant."

If the factual allegations are in fact true, this issue, if properly raised, could have merit. *Compare Myers v. State*, 499 So.2d 820 (Ala.Cr.App.1986) (wherein the court held that the issue of whether former theft convictions barred a subsequent burglary conviction arising out of the same act is

App.4.

MAILING ADDRESS:
P.O. BOX 157
MONTGOMERY, ALABAMA 36101

OFFICE OF
CLERK OF THE SUPREME COURT
STATE OF ALABAMA
MONTGOMERY

TELEPHONE: 261-4609

Re: 86-1474
Ex parte Frederick Lynn
PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS
(Re: Frederick Lynn vs. State)
Appellant — Appellee

You are hereby notified that the following indicated action was taken in the above cause by the Supreme Court today:

_____ Appeal docketed. Future correspondence should refer to the above number.

_____ Court Reporter granted additional time to file reporter's transcript to and including

_____ Clerk/Register granted additional time to file clerk's record/record on appeal to and including

_____ Appell_____ granted 7 additional days to file briefs to and including

_____ Appellant(s) granted 7 additional days to file reply briefs to and including

_____ Record on Appeal filed

_____ Appendix Filed

_____ Submitted on Briefs

_____ Petition for Writ of Certiorari denied. No opinion.

XXXX Application for rehearing overruled. No opinion written on rehearing.
Steagall, J. - Hornsby, CJ., Maddox, Jones, Almon, Shores and Houston, JJ.,
_____ concur; Adams, J., dissents.

_____

7/14/89
bsa

Robert G. Esdale, Clerk
Supreme Court of Alabama

App. 5

STATE OF ALABAMA

IN THE CIRCUIT COURT FOR THE COUNTY OF BARBOUR

THIRD JUDICIAL CIRCUIT

CRIMINAL

STATE OF ALABAMA,]
PLAINTIFF,]
- VS -] CRIMINAL ACITON NO. CC-
FREDRICK LYNN,]
DEFENDANT.]

REPORTER'S OFFICIAL TRANSCRIPT ON APPEAL

BEFORE:

HON. WILLIAM H. ROBERTSON, CIRCUIT JUDGE

EUFAULA, ALABAMA - WEDNESDAY, MAY 13, 1987

TIME: 9:03 A.M.

A P P E A R A N C E S

FOR THE STATE: HON. SAM A. LeMAISTRE, JR.
DISTRICT ATTORNEY
THIRD JUDICIAL CIRCUIT
EUFAULA, ALABAMA

FOR THE DEFENDANT: HON. DONALD J. McKINNON
ATTORNEY-AT-LAW
224 EAST BROAD STREET
EUFAULA, ALABAMA

COURT REPORTER: HON. ANDREW J. CLINGAN, JR., RPR
THIRD JUDICIAL CIRCUIT
2d FLOOR - COURTHOUSE
EUFAULA, ALABAMA

I N D E X

EVIDENTIARY HEARING ON ALLEGATION
OF PURPOSEFUL DISCRIMINATION
MORNING SESSION - WEDNESDAY, MAY 13, 1987 - 9:03 A.M.

WHEREUPON, the following proceedings were had and entered of record as follows, to-wit:

THE COURT: I call the case of State of Alabama versus Fredrick Lynn, case number CC-83-24.

This case has been sent back on remand to this court from the Alabama Court of Criminal Appeals directing this Court to conduct a hearing to determine whether or not the district attorney's strikes established a case of purposeful discrimination against blacks. The Court directed that the defendant prove a prima facie case in court, examine the records, and the strikes of the district attorney,-- Where is the district attorney? -- and the Court stated -- the Court of Criminal Appeals directed this court to have an evidentiary hearing to determine whether or not the case of purposeful discrimination was practiced by the district attorney in his striking of the jury in this case. And in its order the court stated that the defendant should prove a prima facie case of discrimination of purposeful discrimination.

The Court has examined the jury strike list that was used by the or struck from by the plaintiff and defendant and determined that the district attorney struck

all the blacks in the venire with the exception of one who was left on as an alternate and the defendant didn't strike any blacks from the jury; so, therefore, I'm ruling that the defendant does not have to prove a prima facie case, and the burden is now on the State to prove that those strikes were not racially motivated.

With that is the defendant ready?

MR. McKINNON: Yes, your Honor.

THE COURT: Is the State ready?

MR. LeMAISTRE: Yes.

THE COURT: Mr. LeMaistre, you may proceed.

MR. LeMAISTRE: From here, your Honor (Indicating the lectern)?

THE COURT: Yes, or wherever you will be more comfortable.

MR. McKINNON: Your Honor, he needs to be sworn.

SAM A. LeMAISTRE, JR.

the district attorney herein, after first having been duly sworn, testified as follows:

MR. LeMAISTRE: Judge, just to make sure we are all looking at the same list the strike list that I have is two pages in length, forty-two names. That is on the front and back.

THE COURT: Yes, sir.

MR. LeMAISTRE: All right, sir.

THE COURT: It is dated "Jury List, Eufaula, Spring Term, 1986," which the Court will mark as State's Exhibit 1 for the purposes of this hearing.

MR. LeMAISTRE: Yes, sir.

THE COURT: And which will be admitted into evidence if there is no objection from the defendant.

MR. McKINNON: No objection, your Honor.

THE COURT: All right.

MR. LeMAISTRE: Your Honor, what the State would like to do this morning in answering the motion or the presumption that has been put forth by the defendant, I would like to go through the strikes beginning with my first strike and ending with my last, and provide you the reasons that I struck any black persons that I may have struck.

THE COURT: That is fine with the Court. Does that suit the defendant?

MR. McKINNON: Yes, your Honor.

THE COURT: If you want to reserve your right to cross-examine until he gets through with all his reasons then you can pick out any particular one that you want to question him about.

MR. McKINNON: Yes, your Honor.

THE COURT: All right.

MR. LeMAISTRE: Judge, my record reflects that my first strike was number 2 on the venire list, Timothy

Blackshire. He is twenty-eight or was twenty-eight years old last April when this trial was had. He is the brother of Bobby Blackshire who I prosecuted criminally on several occasions, and have convicted, and had sent to the penitentiary. He is the brother of Willie Blackshire who my office is presently enforcing a child -- a court ordered child support, and for that reason, your Honor, we felt that he was, perhaps, about to be prejudiced against me or the State's position, and that is the reason we struck him.

My second strike was number 23, Mamie R. Lindsey. Ms. Lindsey is a black female. She was thirty years old at the time.

Under voir dire questioning she indicated or stated that her husband is related to the defendant, in that case Fredrick Lynn's father, who is Frazier Farrior, and for that reason we elected to strike her.

My third strike was number 11, Larry B. Farmer, black male, age twenty-five at the time. He was young which we did not feel would be favorable to a conviction and sentence of death assuming we got a conviction. He was at the time reputed to be connected with drugs. That information had come to me through various law enforcement agencies, such as the sheriff's department. His father, Clemmon Farmer with whom he was living had a previous felony record of violence out of Florida, and since that

date has been convicted of drug related offense. That added credence to our beliefs that he was at that time connected in the drug business.

His address that was given with the -- with his name here on the strike list indicates a Midway route which is an area of Barbour County where Mr. Don McKinnon, the lead defense attorney, is from, and I was not very familiar with Mr. Farmer other than what had been repeated to me, and I felt he might know Mr. McKinnon and might be favorable to his position.

My fourth strike was Robert J. Thornton, fifty-nine-year-old-black male. He lives on the Gammage Road in an area where the defendant, Fredrick Lynn, was living at the time of this crime, and also where Ms. Rency Lynn and Ms. Alvester Lampley, who are the defendant's grandmother and aunt, respectively, have lived for numerous years. I felt that friendship would possibly be there that would bias him, and for that reason we struck him.

My next strike was number 19, Jim H. Jackson. He is a black male, age thirty-five. He lives on Cotton Avenue in Eufaula. He was a co-employee of Sims Strong, at one time Sims Strong being the father of the accomplice and co-defendant, Gary Marcus Strong, who was a key witness in this prosecution against Fredrick Lynn.

Without question, we did not attempt to

portray him as a fine young man. Gary Marcus Strong has a bad reputation of his own. He pled guilty to a crime in connection with this crime that we tried Fredrick Lynn for; thus, we did not want anyone that might know Gary Marcus Strong's bad reputation and bad background on the venire for fear that they would not believe his testimony. Additionally, a person who was not on the venire named Gary Jackson, with the same last name, came forward before the trial of the case and offered information about what two prospective veniremen may have said concerning their feelings about Fredrick Lynn. I did not know whether Gary Jackson and Jim H. Jackson were related but that was an additional factor that came into play in my decision to strike Jim H. Jackson.

Additionally, your Honor, and I would like to address this at length when I'm through with the people that I struck; but, at this point in relation to this person I would like to say that this Court is certainly aware, but assuming we get a favorable ruling, I would like any future court to review that this is a very small community with a population of twenty-five thousand people of which over twelve thousand five hundred live in the Eufaula area and would have been potential jurors. I have prosecuted here for eight years as district attorney and four years prior to that as assistant district attorney. I have prosecuted Leroy Jackson, Barbara Jackson, Rozell Jackson, Harry

Jackson, James Jackson, Johnny Jackson, Larry Jackson, and Arlene Jackson, all of them, have been convicted of one crime or another of a felony nature. And with that last name, although it is common, all of these people I've just named are black also, and I was not comfortable without knowing that they were not related to any of these people whether they would be favorable to me and the State and would be willing to give the State a fair trial. And those are the reasons that I struck Jim H. Jackson.

My next strike, which I believe was my sixth strike, was number 42, Rose M. Wright, black female, age twenty-eight at the time. Again, she was young, she was unemployed, two factors that I did not feel would be favorable to a verdict of guilt and a sentence of death, which is what the State was looking for.

She lived near or within a block or block and a half of Peggy Wright who has the same last name. Ms. Wright is a city magistrate, and was so at the time of this trial. At the time of this trial, your Honor, Mr. McKinnon was the city clerk of the City of Eufaula where Ms. Wright was the city magistrate. And Mayor E.H. Graves, who is now deceased, although he didn't participate in the trial it is my belief that he assisted in the striking of this jury or assisted Mr. McKinnon and Mr. Gaither in determining who they would like to strike. Because of Ms. Wright's position

with the city, and because of the fact that I did not know whether Rose M. Wright is related, in addition to her being unemployed and young, we chose to strike her. And that certainly is not meant to say that Ms. Rose M. Wright or Ms. Peggy Wright would have done anything improper, but it is something that goes into the thinking of either party, and certainly went into my thinking that a city clerk who is the lead defense counsel, and a mayor at the time, Mayor Hamp Graves, assisting in the striking of that jury, I did not want anyone connected with the city sitting on that jury.

The next strike that I took was number 36, Ms. Rochella Streeter. She is age thirty-three, black, female. She lives in Chattahoochee Courts in an apartment and lives on, I believe, "C" Street. Gary Marcus Strong, the co-defendant, accomplice, and key witness in this prosecution, as I've previously testified, lived on "D" Street approximately one block away. I felt that she would know Gary Marcus Strong, and, again, because we understood that Gary Marcus Strong was not a person of fine moral character we felt that anyone that knew him might doubt what he was telling even though he was under oath. And that is one reason that we struck Ms. Streeter.

We also struck Ms. Streeter because she comes from a very high crime district here in Eufaula. And it is

our belief -- it is my belief that persons in high crime districts may not be as shocked or opposed to crime because those things just happen in those neighborhoods more than others. And those are the reasons we struck Ms. Streeter.

My next strike was Ms. Helen D. Morris, number 26 on the list. She was fifty-two at the time of trial. She also lives on Gammage Road and was a neighbor to Ms. Rency Lynn who is the defendant's grandmother and also Alvester Lampley who is the defendant's aunt, and also was living in close proximity to the defendant who was living with his grandmother and aunt at the time of the crime. We felt the possibility of knowing these people might affect her fairness, and for that reason we struck her.

THE COURT: Mr. LeMaistre, let me interrupt you. I believe your next strike after Ms. Streeter was Mrs. Myrna A. Clayton, which is number 7. She was a white female, and you need to give us the reason for that one.

MR. LeMAISTRE: Excuse me, your Honor. In preparation for this trial -- you are correct -- I was just preparing for the strikes that had to be explained as according to the Supreme Court and other courts. You are correct.

My strike after Ms. Streeter was Ms. Myrna A. Clayton. She is a white female. My ninth strike was

Ms. Helen Morris. Thank you, Judge, and I've just given you the reasons that we struck her.

My tenth strike was Mrs. Mary Alice Scott. She stated that she was a friend of -- she is a black female, age thirty-nine at the time of this trial. She stated she was a friend of Frazier Farrior's wife, and she works with her. Frazier Farrior, again, for the Court is the defendant's father, and for that reason we struck her.

My eleventh strike was Ms. Judy T. Butler, number 6 on the list. She is a white female.

My next strike, State's twelfth strike, number 8, Rhonda M. Cotton. She is also a white female.

My thirteenth strike was number 20, Will Jacob, Jr. Mr. Jacob was eighty years old at the time of the trying of this case. As well as obviously being elderly he appeared somewhat feeble and hard of hearing. I was concerned about his ability to withstand the rigors of what I knew to be a two- to three-day trial. I was also afraid he could not remain attentive throughout that time period. And I think in a case of this magnitude it is vitally important that we have jurors that listen attentively and hear everything that is said for either the State or the defense. Additionally, if my recollection serves me correctly, he was somewhat weak on death qualifications although he did say he could convict if the evidence was there. He was not

someone that should be challenged for cause but his responses were not what I felt the State would like to have in that case.

My last strike, State's fourteenth, was number 10, Jo Ann Dinkins. She is twenty-three. Again, she is young which we did not prefer to have on the jury if we could avoid it. She has a child that's fathered by co-defendant's, Gary Marcus Strong's, brother which, again, would conclude me to believe that she knew of Gary Marcus Strong, knew of his bad character. And, again, we did not want a person on the jury that would tend to disbelieve what turned out to be our key witness in the case. She is also related to Investigator Early Dinkins who was also a witness in this case by marriage. But, by her admission, and what Mr. Dinkins told me prior to the trial of the case, they did not associate with one another. Mr. Dinkins stated to me he felt she would not be favorable to the State's case. Additionally, she was a classmate of Gary Marcus Strong; so, again, she did know him. And as I've stated, your Honor, there is no question of Gary Marcus Strong being -- he was a person of bad character. And we just wanted to avoid people that might tend to disbelieve him although he was under oath.

Judge, those are the strikes of black persons that the State took in the trial of this case, State versus

Fredrick Lynn, that was held, I believe, on April 1st, 1986, or which began on that date.

I'm a little unfamiliar with the entire proceedings here. I'll let Mr. McKinnon, if that is appropriate, cross me on anything he would like, but I would like the right to reserve some comments at the end concerning this procedure.

THE COURT: Yes, certainly.

And if he is going to cross you, I guess the thing to do is take Mr. Crawford's place in the witness stand.

CROSS-EXAMINATION

BY MR. McKINNON:

Q Let me see. Mr. LeMaistre, in reference to your first strike, Timothy Blackshire, at the time of the trial, and at the time that the jury was selected, did you know that he was the brother of Bobby Blackshire?

A Yes, sir.

Q And did you know that he was a brother of Willie Blackshire?

A Yes, sir. I knew prior to that that Willie and Bobby are brothers, and learned that Timonty was their brother prior to the striking of this jury.

THE COURT: Mr. LeMaistre, in order to strike the jury did you know all the facts that you

stated on your direct testimony before this jury was struck?

MR. LeMAISTRE: Yes, sir.

THE COURT: Okay. Mr. McKinnon, you can do away with all such questions as that. He testified under oath he knew everything that he said before the trial.

MR. McKINNON: All right.

Q (Mr. McKinnon continuing) Since the trial have you researched any information on these individuals? Have you looked for any information on these individuals?

A I have not done any research. I certainly have talked with my assistant, Mr. Grubb, and Mr. Dinkins, who assisted me prior to the striking of this jury, just to verify that some things I've testified today were things that I knew at the time of the trial.

Q All right. Now, among the individuals that you did not strike were there not some whose relatives you had prosecuted?

THE COURT: Now, Mr. McKinnon, does that question -- is that -- does that mean the ones that were left that served on the panel?

MR. McKINNON: (No response.)

THE COURT: Now, you struck some that he might have struck if you hadn't struck them. So,

is your question limited to the ones that actually served on the jury?

MR. McKINNON: It would be all of them including some I struck, because some of them I struck by the way, and some of them I struck after determining that he was not going to strike them.

THE COURT: Now, you couldn't determine that, Mr. McKinnon, until the jury was totally struck could you?

MR. McKINNON: Right. As it gets closer to the end you go back and get some if you feel the other side might strike.

THE COURT: Well, I understand about striking juries, but I think you can ask Mr. LeMaistre whatever questions you want to that are reasonable, but if they weren't on the jury he could have struck them. So, why don't you limit your questions to the ones that served on the jury, because you asked him to look at some forty something names that he might or might not remember.

MR. McKINNON: All right.

Q The people that served on the jury, are there not some with relatives who you prosecuted?

A I know of no relative of Robert Bradley that I have prosecuted; I know of no relative of Doyle T. Burress that I have prosecuted; I know of no relative of Christine Giannascoli that I have prosecuted; I know of no relative of Richard Hatfield that I have prosecuted; I know of no relative of Glenda Jackson that I have prosecuted; I know of no relative of Michael Kornegay that I have prosecuted; know of no relative of James H. Lindsey that I have prosecuted; I know of no relative of Lewis R. Powers that I have prosecuted; I know of no relative of Ms. Joan C. Snell that I have prosecuted; or of Mr. Jimmy Sowell--I know of no relative of his I have prosecuted; I know of no relative of Charles C. Warr--I know of no relatives of his that I have prosecuted, or Ms. Jessie V. Williams. I know of no relatives of any of those people, and I believe that is the venire.

THE COURT: The jury.

MR. LeMAISTRE: Excuse me, the jury.

MR. McKINNON: All right.

MR. LeMAISTRE: And that is not to say I haven't, but that is my recollection looking at this list right now. Yes, sir. I know of no relatives of any of those people that I have prosecuted or have been convicted of a crime.

MR. McKINNON: Okay.

Q Do you know of any of those people who have been in support court?

A Mr. McKinnon, I do not attend support court on a regular basis, but looking at this list I would say no, sir, I know of none that we have had in support court.

Q Okay. Do you know whether any of these people live in proximity of Chattahoochee Courts or in proximity of the Gammage Road area where Fredrick and his relatives used to live?

A I do not see any of these persons that live in close proximity or in -- or in close proximity to Chattahoochee Courts. I see that Mr. Burress does live on Gammage Road, but he does not live in what is known as Norcutt Manor which are the black projects, so to speak, up there. The row of black homes on the right as you proceed north up that road, and for that reason I did not believe he was in that neighborhood and would not be a friend of Ms. Rency Lynn or Alvester Lampley or this defendant, Fredrick Lynn.

Q Now, among the people that were left serving on the jury panel, were some young people and some unemployed people were there not?

A There were some young people. Let me look back at it. I don't see any unemployed people. I don't recollect

any of the people as being unemployed. Yes, there are some young people on that jury.

Q Okay. Now, with reference to Larry Farmer, as far as the part of the county in which he resides, isn't Route 2, Midway, in -- isn't that the Mt. Andrew area rather than the Comer area?

A Mr. McKinnon, I'm not sure about that -- about exactly where that route is I would like to say for the record you very ably had this trial postponed one time several years ago because you noted that an area there at AOC, or whoever draws the venire, had excluded the Midway route, which didn't mean anything to me, and thus I feel that you are familiar with that area. You brought that very ably to the Court's attention, and Judge Jack Wallace, who was the presiding judge at that time, granted a continuance in order to have a proper cross-section of this area of the county brought so we could pick a proper jury. So, I did not try to endeavor as to whether -- to learn whether this fellow, Mr. Farmer, lived in close proximity to you or your family which still lives in the Comer area. I just knew it was an area that you obviously were familair with, and I do not feel I was familiar with.

Q Okay. Now, awhile ago you indicated one of the reasons

you struck an individual was because he lived in a high crime area. What areas of Eufaula would you define as high crime areas?

A I would consider Chattahoochee Court a high crime area. I consider the area off of Dale Road known as Dudley Quarters as a high crime area. In Eufaula those would be the two high crime areas that first come to mind.

Q Are those both predominently black neighborhoods?

A Yes, sir.

Q Is the area of town out on Gammage Road where Fredrick Lynn lived, is that a predominently black area?

A The area where Fredrick Lynn was living at the time?

Q Right.

A Yes, sir, that is a predominently black area. Now, just for classification, I don't think I would characterize all of Gammage Road as a black area. I know a lot of black and white people that live up there.

Q Okay. So, that particular subdivision --

A (Interposing) That particular subdivision to my knowledge is totally black.

Q Okay. And the people that you struck from the Gammage Road area would have been people that lived in or near that particular subdivision?

A That was what I believed, and that is correct.

Q Okay. Now, at the -- at the time that you selected

the jury were you aware that Gary Jackson had any connection with Jim Jackson?

A No, sir, not with any degree of certainty. As I believe I stated, when I was giving my reasons Gary Jackson came forward with some information that he believed was important concerning what two prospective jurors may or may not have said concerning Fredrick Lynn's guilt or innocence, or what should be done to him if he was found guilty. I merely associated Gary Jackson was black, Jim Jackson was black, and that added to my reasons that I already -- as I stated in my explanation, that just added another reason that I would not be receptive to having him on the jury.

Q Okay. Now, in making the case against Fredrick Lynn, city policemen and investigators had a large role in making that case against him did they not?

A Yes, sir.

Q Okay. And did you feel that people that were connected with the city would be more likely to be influenced by my connection with the city at the time, and Mayor Graves' connection at the time, and that would be in the fact that the city had a lot to do with making the case?

A I wasn't sure. I think at the time you signed the checks, and I certainly don't mean any impropriety

toward any personnel that worked for the city at the time, but I thought a prudent move, in view of the fact that the Mayor and city clerk were participating in the defense of this defendant, to remove any possibility, that I should take them off, and I certainly feel like they are probably happy I took them off, because this is the real world and I'm sure they would hate to face you and Mr. Graves, not that you would have done anything improper, but they would have had a hard time looking you in the face, you know, if they had decided the way this jury had decided. And for those reasons I chose to take them off.

Q Okay. Now, the connection of Rose -- the possible connection of Rose Wright to Peggy Wright would have been a very indirect relationship, would it not?

A I don't know. I didn't know then and I don't know now if they are related or not. I know they live close to one another and have the same last name.

Q Okay. So, possibly, they might be married to people that are married to each other and possibly not be related at all?

A Correct.

Q Okay. Now, when you look at the high crime areas of Eufaula, as you defined it, that will encompass a rather significant percentage of the black population

of Eufaula would it not?

A I don't know what percentage of the population. As I've stated before, those two areas are predominently black or, perhaps, solely black; but, I don't know what percentage of the black population of Eufaula or Barbour County lived in Dudley Quarters or Chattahoochee Courts.

Q Do you recall how you learned that Mary Alice Scott was a friend of Frazier Farrior?

A Mr. McKinnon, I believe that was brought out during voir dire of the prospective jurors. That is my recolleciton.

Q According to your notes who was?

A Excuse me, it was brought out that she was a friend of Frazier Farrior's wife who is not, I assume, is not -- is not the defendant's mother but who is the lady that is married to the defendant's father, Frazier Farrior, and in addition to being her friend she is her co-worker. I don't -- my notes don't reflect, and I have not -- I just don't know if she is a friend of Frazier Farrior's or not. She is a friend of the lady that Frazier Farrior is now married to, and that was brought out in the questioning by me and you.

Q Okay. Of the jurors who actually served, according to your notes, who is the oldest one?

A Of the ones that served?

Q Right.

A Let me check. I believe it's going to be Ms. Jessie Vaughn Williams, but let me look so I'll be correct. According to the birthdates that are on the original venire list Ms. Jessie V. Williams would be the oldest.

Q Okay. And what -- according to your information how old was she?

A Sixty-nine.

Q Sixty-nine. You stated earlier that Rose M. Wright's possible relation to a city employee was one of the things that induced you to strike her; but, according to your information are there relatives of city employees that actually served on the jury panel?

A There are relatives of --?

Q Of city employees?

A The only person I see -- No, sir, I don't see any. Now, Jimmy Sowell was a fireman for a period of time, but my notes show he was working at Lakeview Hospital at the time of this case. I'm not saying there are or not, but I'm not aware of any relatives of these twelve individual employees of the City of Eufaula.

Q Even though I'm the one that actually struck her did you have Linda Benefield listed as one that you intended to strike?

THE COURT: Mr. LeMaistre, for the purposes of this hearing you may object to his questions.

MR. LeMAISTRE: I can object? Well, Judge, I do object.

THE COURT: Sustained.

MR. McKINNON: Your Honor, I would admit that that one is relevant particularly because the whole concept leads to the thought processes, you know, whether the strike was racially motivated. And this is an individual whose paychecks I signed at the time--whose husband's checks I signed at the time. While Rose M. Wright is just a possible relative and neighbor of somebody --

THE COURT: (Interposing) Mr. McKinnon, let me submit to you that the directions to the Court from the Court of Criminal Appeals said that the district attorney -- for me to find out if he had a rational explanation. As far as striking. It doesn't require him to get on the stand and tell what his intention was whether he should strike every man, woman, or child on the jury, and I'm not going to let you ask him that, and I sustain his objection. Now, you continue on.

MR. McKINNON: Your Honor, my effort on that was to show the same reasons would have been equally applicable, you know, to people who were not --

THE COURT: (Interposing) Well, I'm not going to let you ask him about his intentions as to whether he should strike anybody off the jury, Mr. McKinnon. And I'm not going to argue with you about it any more, or let you argue with me about it any more.

MR. McKINNON: All right.

Q Mr. LeMaistre, when we had a hearing on this matter before Judge Wallace on the motion for a new trial, and we were discussing the Batton case before Judge Wallace, did you not make a statement to the effect that your records as to the reason for your jury strikes were very limited, and you did not know whether they could be reconstructed at that time?

A I don't recall any statement to that effect.

MR. McKINNON: Excuse me, your Honor, could I confer with Mr. Lynn just a moment?

THE COURT: Yes, sir.

Q Mr. LeMaistre, awhile ago you testified as to the small size of the community and inevitable relationships and

cross-connections, as I understood it, that we have. Isn't it true that these near relationships would be such that there could also be a second reason to strike a person who is black other than just being black?

A I'm not really sure I understand the question, or what you are getting at.

It is a small community, and when you are from this community, as I am, I've lived here thirty-five years, and have been an elected official for eight years, I would say there could be other reasons to strike any person more than race. I think I know a great number of people in this community. I know almost everyone that was on that panel that we struck from, and I think, certainly, race would not be the only motivating impetus to strike any person.

Q But, it was one of the emphases, one of the considerations?

A No, sir.

Q Right?

A No, sir.

Q So, when you made these strikes you completely disregarded the race of individuals struck; is that correct?

A Race didn't have an effect on who I struck.

If I might at this point, your Honor, just

for the record, and for this Court, and if we were to get a favorable ruling here for any future court, as I stated a couple of times previously, when you are from an area the size of Eufaula, and you have grown up here, and you come back, and you have been an elected official, which means you have to interact with a great number of people, black, white, young, and old, you are going to know these people, and you are going to know a lot about these people. You are going to be thrown civically with some people and then socially with some people. And people that are my close friends are people -- or friends of mine or acquaintances are people that I have a great deal of respect for, and are the kind of people I want on the jury. And those are the people that I would chose not to strike; but, they are not necessarily all white people, and they are certainly not all black people. Race is not the factor that determines who I strike.

I think it would be ludicrous for me to strike folks like Bobbie Bradley who I play golf with on occasion. It would be rediculous for me to strike Richard Hatfield who I went to high school with, and whose wife was at one time a secretary for an attorney here in town, and she is a year younger than me. These are people that I'm just not going to strike. It is

not because they are white, it is because I know them, and I respect their opinion, and I think they will do the right thing, and they are the kind of people I want serving on any jury. And there was no one struck from this jury simply on the basis of race from my standpoint, and that's from the State's standpoint.

Now, Mr. McKinnon, I know the courts don't require you to explain your reasons but I submit to you that I'm coming with clean hands and not just you, and it's not an attack on you but I think the defense is going to have to answer the question at some point or we are going to have to change the way we strike juries.

MR. McKINNON: I'll answer this question at this point if I may.

THE COURT: Well, we'll put you under oath in a little while, Mr. McKinnon, if you want to. You are not under oath now, so you are not required to answer any questions.

MR. McKINNON: Okay. That is all I have.

MR. LeMAISTRE: That is all, Judge. I think that fairly well sums up the thing.

THE COURT: Mr. McKinnon, would you like to call any witnesses or anything?

MR. McKINNON: Since that particular issue was

raised I would like to go under oath just to address that point very briefly.

THE COURT: Why don't you take the stand and let the court reporter swear you in.

DONALD J. McKINNON

defense counsel herein, after first having been duly sworn, testified as follows:

MR. McKINNON: Your Honor, when I selected jurors by striking I deliberately avoided striking any blacks because I anticipated tnat they would be struck anyhow. There were a couple of individuals that I seriously considered striking but they got removed -- a couple of blacks that I seriously considered strking but they were struck by the other side; but, I deliberately avoided striking blacks because of what I had anticipated.

THE COURT: All right. For the record, Mr. LeMaistre mentioned in his testimony that he thought Mayor Graves helped you select the jury. Is that correct?

MR. McKINNON: Not as far as names are concerned. He gave me some guidelines as far as age, and background, and that sort of thing, but no specific names.

THE COURT: But, he did assist you in your preparation for this trial, and was seated right behind

counsel table, and you had several consultations with him during the trial did you not?

MR. McKINNON: That's correct.

THE COURT: And he did help you strike a jury. Is that what you are saying?

MR. McKINNON: He gave me advice on how to strike them, but no names were mentioned. He said to look for certain types of people.

THE COURT: Yes, sir. Thank you.

MR. McKINNON: Yes, sir.

THE COURT: Anything further for the State?

MR. LeMAISTRE: No, sir.

THE COURT: Anything further for the defendant?

MR. McKINNON: Your Honor, of course, it's a very peculiar type proceeding without saying any more, but I feel like when you have got twelve individuals that are on the panel -- I think we ended up with -- What was it? Eleven blacks? But, you know, whenever the -- when the district attorney, you know, uses all of his strikes to eliminate blacks, and we have got a variety of reasons, the --the neighborhood and that sort of thing --. And if you are dealing with four, and five, and six, you know, one could easily say that race truly

had no effect on it, but when it gets up to this level it begins to be more than coincidental. I'm not making any accusations of dishonesty, but I have got to look after a record for appeal; but, consciously or subconsciously somehow race enters into it when you start considering these types of considerations, and they do lead to the elimination of all blacks. It is just hard to say that race has nothing to do with it. And that is, really, all I have to say.

THE COURT: All right, sir.

The Court finds that the State has met its burden after the Court granted the defendant his prima facie case without having to make -- to prove anything. The Court finds that the district attorney has more than amply explained his reasons for striking the persons that he did off the jury, and that those reasons show that the strikes were not racially motivated; so, this motion, as to what I assume is my direction from the Court to determine whether or not Mr. Lynn should be granted a new trial, based on these grounds, it is my determination he should not

be granted a new trial. And the finding of this Court will be reduced to writing and mailed to the Court of Criminal Appeals as directed.

Okay, we are finished.

MR. LeMAISTRE: Thank you, Judge.

MR. McKINNON: Thank you.

(THEREUPON, court stood in adjournment)

* * * * *

CERTIFICATE OF COMPLETION OF
REPORTER'S TRANSCRIPT

STATE OF ALABAMA,]
]
PLAINTIFF,] TO: The Clerk of the Criminal Court of Appeals
]
- VS -]
] CRIMINAL ACTION NO. CC-
FREDRICK LYNN,]
]
DEFENDANT.]

I, ANDREW J. CLINGAN, JR., RPR, Official Court Reporter for the Third Judicial Circuit of Alabama, certify that I have this date completed and filed with the Clerk of the Trial Court the original and three copies of a true and correct transcript of the evidence and matters designated by the appellant. All pages are numbered serially, centered at the top, right-hand corner, prefaced by an index and ending with the number appearing at the top of this certificate.

I certify that a copy of this certificate has this date been served on: The Clerk of the Criminal Court of Appeals, the Attorney General, and counsel for the defendant.

Dated this the 18th day of May, 1987.

Andrew J. Clingan, Jr.

Andrew J. Clingan, Jr., RPR